TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 607.

DAVIS AND FARNUM MANUFACTURING COMPANY, APPELLANT,

vs.

THE CITY OF LOS ANGELES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

FILED DECEMBER 24, 1903.

35276

(18,735.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 507.

DAVIS AND FARNUM MANUFACTURING COMPANY, APPELLANT,

vs.

THE CITY OF LOS ANGELES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 8, 1902.

a UNITED STATES OF AMERICA, ss:

To the City of Los Angeles, a municipal corporation, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington in the District of Columbia, on the 27th day of November, A. D. 1902, pursuant to an order allowing an appeal entered in the clerk's office of the circuit court of the United States of America of the ninth judicial circuit, in and for the southern district of California, from a final decree signed, filed, entered and recorded on the 3rd day of April, 1902, in that certain cause, being in equity, No. 1015, wherein The Davis & Farnum Manufacturing Company, a corporation, is complainant and appellant and you are defendant and appellee, to show cause, if any there be, why the decree rendered against said appellant in the said order allowing appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Olin Wellborn, United States district judge for the southern district of California, and one of the judges of the circuit court of the United States of America, of the ninth judicial circuit, in and for the southern district of California, this 29th day of September A. D. 1902, and of the Independence of the United States, the one hundred and twenty-seventh.

OLIN WELLBORN,
U. S. District Judge for the Southern District of California.

Received copy of the foregoing citation this first day of October, 1902.

W. B. MATHEWS,
City Attorney, and Attorney for Defendant,
City of Los Angeles.

b [Endorsed:] In the Supreme Court of the United States, The Davis & Farnum Manufacturing Company, .. corporation, appellant, *vs.* The City of Los Angeles, a municipal corporation, appellee. Citation. Filed Oct. 1 1902 Wm. M. Van Dyke, clerk —— —— deputy

1 In the Circuit Court of the United States of America of the Ninth Judicial Circuit in and for the Southern District of California Southern Division.

DAVIS & FARNUM MANUFACTURING COMPANY, a Corporation, Complainant,
vs.
THE CITY OF LOS ANGELES, a Municipal Corporation, Defendant.
No. 1015.

2 In the Circuit Court of the United States in and for the Southern District of California, Southern Division.

DAVIS & FARNUM MANUFACTURING COMPANY, a Corporation, Plaintiff,
vs.
THE CITY OF LOS ANGELES, a Municipal Corporation, Defendant.
Bill of Complaint.

To the honorable judges of the circuit court of the United States in and for the southern district of California, in equity sitting:

Davis & Farnum Manufacturing Company, a citizen of the State of Massachusetts plaintiff, brings this its bill of complaint against The City of Los Angeles, a citizen of the State of California, defendant, and thereupon your orator complains and shows.

That at all times mentioned in this complaint your orator was a corporation duly organized and doing business under and by virtue of the laws of the State of Massachusetts, and engaged in the general business of iron founders and manufacturers of machinery, gas works, gas holders and receivers, and other machinery.

That the said defendant, The City of Los Angeles, is a municipal corporation duly organized under the laws of the State of California and situate in the county of Los Angeles, in said southern district of California.

And your orator further showeth unto your honors, that on or about the first day of September, A. D. 1901, at the city of Los Angeles in said district, one Caroline W. Dobbins, a citizen and resident of the county of Los Angeles and State of California, in said district, made and entered into a certain contract with the Valley Gas and Fuel Company, a corporation duly organized and
3 doing business under and by virtue of the laws of the State of California, (for the purpose, among other things, of erecting gas works), to build, construct and erect for the said Caroline W. Dobbins on certain premises to be designated by the said Caroline W. Dobbins in the said city of Los Angeles, and on certain premises owned by her, as hereinafter described, certain gas works, including all things necessary for the manufacture, recovery and storage of gas.

That in order to enable the said Valley Gas & Fuel Company to carry out the said contract with the said Caroline W. Dobbins aforesaid, your orator on or about the 17th day of September, A. D., 1901, at Waltham, in the State of Massachusetts, entered into a certain

contract with the said Valley Gas and Fuel Company to erect on those certain premises in the city of Los Angeles, to be designated by said Caroline W. Dobbins, certain portions of certain gas works for the manufacture, recovery and storage of gas, consisting more particularly of a certain water tank and gas-holder, said water tank and gas-holder to be laid upon a cement foundation prepared by the said Valley Gas & Fuel Company, to be sixty-two feet in diameter by twenty feet nine inches (20 ft. 9″) in height, and of a capacity of about four hundred sixty-seven thousand and seven hundred (467,700) gallons of water; said tank to be made of sheet steel and iron; to have a steel bottom thoroughly riveted and made water-tight, with sides consisting of four steel rims, each of about five feet in height, thoroughly riveted and made water-tight. On the top and outside of said tank, a run-around of steel two feet six inches (2 ft. 6″) in width, together with braces for said tank sixty feet nine inches (60 ft. 9″) in height, with twenty (20) girders re-enforced with forty-eight (48) tie-bars and also wind braces; the textile strength of said water tank to be sixty-two thousand (62,000) pounds to the square foot. Inside of said water tank to erect a steel
4 gas-holder of a capacity of one hundred thousand (100,000) cubic feet of gas, consisting of two lifts with proper curbs and cups, each lift being made of steel, eight sheets, with cups and curbs, all properly constructed and completed, the same to be done as quickly and speedily as possible; said holder to be all complete and delivered to the Valley Gas & Fuel Company, pursuant to its said contract with the said Caroline W. Dobbins, of the best material suitable for such purposes, and in a good and workmanlike manner.

In consideration whereof the said Valley Gas & Fuel Company agreed to pay unto your orator for said work the sum of thirteen thousand six hundred and eighty-five ($13,685) dollars, upon the delivery of said works complete.

And your orator further showeth unto your honors that immediately on the entering into of said contract, your orator at its manufactory in the State of Massachusetts, commenced the construction of said water tank and gas-holder, and the building of the necessary machinery to be used in connection therewith, and prepared and foundered the necessary iron and steel to be used therein; that as soon as the same was completed at said foundry the same was forwarded from the city of Waltham, in the State of Massachusetts, by railroad transportation to the city of Los Angeles, in the State of California, in said district, and delivered upon the premises of the said Caroline W. Dobbins hereinafter particularly described, and by her designated for that purpose; that since the arrival of said iron and steel on said premises as aforesaid, your orator employed divers and sundry men and skilled mechanics, at great expense to your orators, bringing said men from different parts of the United States, to wit: from Trenton, New Jersey, Philadelphia, Pennsylvania, from Toledo, Ohio, from San Francisco in the State of California, and from other places, for the purpose of putting together and erecting the said water tank and gas-holder with the steel so made and

furnished by your orator as aforesaid; and pursuant to the
5 contract aforesaid, with said men, your orator has commenced the erection of said water tank and gas-holder and has so far erected the same, that at this time said water tank is now erected fifteen feet and nine inches (15 ft. 9″) in height, and if your orator is allowed to go on with said work, without interruption and interference from the said defendant, the said water tank will in the course of a week or ten days be fully completed by your orator, according to the said contract entered into between your orator and the Valley Gas & Fuel Company as aforesaid. And your orator is ready, willing and able, with said men, and with said steel, to complete the erection of said gas-holder and fulfill and carry out on its part the terms of said contract so entered into between your orator and the said Valley Gas & Fuel Company as aforesaid.

And your orator further showeth unto your honors that on or about the 26th day of August, A. D. 1901, the common council of the city of Los Angeles attempted to pass a purported ordinance known as ordinance No. 6663, new series, entitled "An ordinance prohibiting the erection or maintenance of gas works, gas tanks or reservoirs within certain portions of the city of Los Angeles," which said ordinance was on the said 26th day of August, 1901, attempted to be approved by the mayor of the city of Los Angeles, and duly published in the official paper of the city of Los Angeles in accordance with the provisions of the charter of the said city of Los Angeles, which said purported ordinance is in words and figures as follows, to wit:

Ordinance No. 6663.

(New series.)

An ordinance prohibiting the erection or maintenance of gas works, gas tanks or reservoirs within certain portions of the city of Los Angeles.

The mayor and council of the city of Los Angeles, do ordain as follows:

SECTION 1. It shall be unlawful for any person, firm or cor-
6 poration to erect or cause to be erected, maintain or cause to be maintained any works, establishment or manufactory for the manufacture of gas; or any tank, reservoir or other receptacle for the storage of gas within the corporate limits of the city of Los Angeles, outside of the limits of the district described as follows; to wit:

Beginning at the intersection of the center line of the official bed of the Los Angeles river with the south charter boundary line of the city of Los Angeles; thence westerly along said south charter boundary line to the center line of Santa Fe avenue; thence northerly along the center line of Santa Fe avenue, to the center line of Violet street; thence westerly along the center line of Violet street to the center line of Wilson street; thence northerly along the center line of

Wilson street to the center line of Atlantic street; thence westerly along the center line of Atlantic street to the center line of Alameda street; thence northerly along the center line of Alameda street to the center line of Palmetto street; thence easterly along the center line of Palmetto street to the center line of Molino street; thence northerly along the center line of Molino street to the center line of Fourth street; thence easterly along the center line of Fourth street to the prolonged center line of Santa Fe avenue; thence northerly along said prolonged center line of Santa Fe avenue to the center line of First street; thence easterly along the center line of First street to the center line of Center street; thence northerly along the center line of Center street to the center line of Aliso street; thence westerly along the center line of Aliso street to the center line of Alameda street; thence northerly along the center line of Alameda street to the center line of San Fernando street; thence easterly along the center line of San Fernando street to the center line of the official bed of the Los Angeles river; thence southerly along the official bed of the Los Angeles river to the point of beginning.

7 SECTION 2. Any person, firm or corporation who shall violate any of the provisions of this ordinance shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than one hundred dollars ($100) nor more than five hundred dollars ($500) or by imprisonment in the city jail for not less than thirty (30) days nor more than one hundred (100) days, or by both such fine and imprisonment. Every day that such gas works, tank or reservoir is maintained in violation of the provisions of this ordinance shall be deemed a separate offense within the meaning of this ordinance.

SECTION 3. Ordinance No. 174 approved July 2nd, 1885, and all other ordinances or parts of ordinances in conflict herewith are hereby repealed.

SECTION 4. The city clerk shall certify to the passage of this ordinance and cause the same to be published once in the Los Angeles Daily Journal, and thereupon and thereafter it shall take effect and be in force.

I hereby certify that the foregoing ordinance was adopted by the council of the city of Los Angeles, at its meeting of August 26th, 1901.

C. H. HANCE, *City Clerk.*

Approved this 26th day of August, 1901.

M. P. SNYDER, *Mayor.*

And your orator further shows that thereafter, within the territory of the city of Los Angeles, within which, by said purported ordinance last hereinbefore set forth, it was lawful to erect or maintain gas works, gas tanks or reservoirs for the manufacture of gas, and on or about the 28th day of September, A. D. 1901, the said Caroline W. Dobbins, for the purpose of erecting gas works, purchased the following-described premises situate in the city of

Los Angeles and State of California, to wit: All of lots sixteen
8 (16), seventeen (17) and eighteen (18) of block two (2), Pomeroy & Mills' subdivision of the Hollenbeck tract, as per map recorded in Book Five, page 199, miscellaneous records of said Los Angeles county; also that part of lot fifteen (15) in said block two (2), described as follows, to wit:

Commencing at a point in the northerly line of St. John street at the most southerly corner of said lot fifteen (15); thence along the dividing line between lots fifteen (15) and sixteen (16) of said block two (2), north forty-six degrees (46°) west thirty-eight and fifty one-hundredths (38.50) feet to a point; thence north thirty-four degrees and two minutes (34° 2′) east nine and sixty-four one-hundredths (9.64) feet to a point; thence north twenty-nine degrees and forty-two minutes (29° 42′) east fifty (50) feet to a point; thence north twenty-two degrees and eighteen minutes (22° 18′) east forty-four and twenty-eight-hundredths (44.28) feet to a point in the westerly line of the tract conveyed to D. McCool, trustee, by deed recorded in Book 461, page 7 of deeds, records of said Los Angeles county; thence along the westerly line of said tract conveyed to D. McCool, trustee, south three degrees and thirty-seven minutes (3° 37′) west, one hundred and six and thirty-seven-hundredths (106.37) feet to a point in the northerly line of St. John street; thence along the northerly line of St. John street forty-four degrees (44°) west eighteen and three-tenths (18.3) feet to the place of commencement.

And your orator further shows that on or about the 28th day of December, A. D., 1899, the city council of the city of Los Angeles, passed a certain ordinance known as ordinance No. 6181, new series, of the city of Los Angeles, entitled "An ordinance regulating the manner of constructing, altering, repairing, moving (when moved without entering upon a public street or alley) of buildings in the city of Los Angeles; providing for the issuing of permits for the same and for the condemnation of buildings and other structures when dangerous to property, life or limb;" section 101 of
9 which ordinance was in words and figures as follows:

"It shall be unlawful for any person, firm or corporation, to erect or cause to be erected, maintained or cause to be maintained, occupy, or cause to be occupied, any livery stable, blacksmith shop, stone-crusher, rolling mill, planing mill, carpet-beating establishment, fireworks factory, soap factory, gas works, or other factory where power other than animal power or water power is used, outside of the limits of fire district No. 1 of the general fire limits of the city of Los Angeles, and within the corporate limits of said city without a permit from the fire commissioners so to do. Before any such permit shall be granted, the clerk of the board of fire commissioners shall mail a notice to each record owner of real property in the block in which it is intended to erect the building or structure for which a permit is sought, by depositing in the United States post-office a postal card directed to each such record owner of property at his last known address, notifying said record owner of the fact that such permit is applied for, the nature of the same, and the time and place when and where the application for

the granting of the same will be heard. Said board shall at such hearing give an opportunity to all parties interested to be heard, and shall have power to grant or refuse such permit. The costs of mailing said notice to be first deposited, by said applicant, with the clerk of said board."

And your orator further shows that by the charter of the city of Los Angeles, it was provided that there should be four fire commissioners appointed by the council of the city of Los Angeles, and that they should have such powers and perform such duties as should be granted or imposed by ordinance. And your orator further shows that pursuant to the regulations in said ordinance prescribed, and said ordinance being in full force and effect, on or about the first day of November, A. D., 1901, the said Caroline W. Dobbins, for the purpose of manufacturing, recovering and distributing
10 gas made application to the board of fire commissioners of the city of Los Angeles for a permit to erect gas works, which application of the said Caroline W. Dobbins to the said board of fire commissioners was in words and figures as follows:

"To the Hon. M. P. Snyder, mayor of the city of Los Angeles, and the board of fire commissioners.

GENTLEMEN: The undersigned, Caroline W. Dobbins, a resident of the county of Los Angeles and State of California, for the purpose of manufacturing, recovering and distributing gas, respectfully asks for a permit from the fire commissioners to erect works for the manufacture, recovery and storage of gas upon the following-described premises, situate in the city of Los Angeles, State of California, to wit:

All of lots sixteen (16), seventeen (17) and eighteen (18) in block two (2), Pomeroy and Mills' subdivision of the Hollenbeck tract, as per map recorded in Book 5, page 199, miscellaneous records of said Los Angeles county. Also that part of lot fifteen (15) in said block two (2) described as follows, to wit:

Commencing at a point in the northerly line of St. John street, in the most southerly corner of said lot fifteen (15); thence along the dividing line between lots fifteen (15) and sixteen (16) of said block two (2), north forty-six degrees (46°) west thirty-eight and fifty one-hundredths (38.50) feet to a point; thence north thirty-four degrees and two minutes (34° 2′) east nine and sixty-four one-hundredths (9.64) feet to a point; thence north twenty-nine degrees and eighteen minutes (22° 18′) east forty-four and twenty-eight-hundredths (44.28) feet to a point in the westerly line of the tract conveyed to D. McCool, trustee, by deed recorded in Book 461, page 7 of deeds, records of said Los Angeles county; thence along the westerly line of said tract conveyed to D. McCool, trustee, south three
11 degrees and thirty-seven minutes (3° 37′) west one hundred and six and thirty-seven-hundredths (106.37) feet to a point in the northerly line of St. John street; thence along the northerly line of St. John street south forty-four degrees (44°) west eighteen and three-tenths (18.3) feet to the place of commencement.

Said premises are within the limits prescribed by an ordinance

passed by the city council of the city of Los Angeles on the 29th day of August, 1901, in which it shall be lawful to erect and maintain works for the manufacture of gas. Said gas works are to consist of fire-proof buildings and tanks to be constructed of iron, brick, stone and concrete, and no buildings, tanks or other works are to be constructed thereon of any combustible material.

That the gas so manufactured or so to be manufactured is to be supplied to the inhabitants of the city of Los Angeles for illuminating purposes only.

(Signed) CAROLINE W. DOBBINS."

That said application of the said Caroline W. Dobbins was on said first day of November, 1901, presented to the fire commissioners and by them was referred to the chief of the fire department for investigation and report, and thereafter, on the 8th day of November, 1901, the application of the said Caroline W. Dobbins for permission to establish gas works was taken up by the fire commissioners; that the clerk of the board of fire commissioners reported that the petitioner had advanced the costs of sending required notification to property-owners as prescribed in the building ordinance as aforesaid, and that notices had been sent notifying the record owners of the property in the block in which it was intended to erect said building or structure, for which permit was sought, of the fact that such permit was applied for, the nature of the same, and the time and place when and where the application for the granting of the same would be heard; that at said meeting of the board, said board gave an opportunity to all persons interested to be heard, and on motion duly made, then and there took
12 the said application and the matters therein referred to, under advisement; that afterwards, on or about the 22nd day of November, 1901, such further proceedings were had before the fire commissioners upon said application, that on motion the application of Caroline W. Dobbins for permission to erect and maintain a gas works was taken from the table and it was duly moved and seconded that the application be granted; that upon the hearing of said motion three of said commissioners, to wit: Commissioners Webb, Vickery and Frankenfield voted aye and Commissioner Kuhrts no; that thereupon and after said vote was announced the said Commissioner Kuhrts changed his vote on said motion from no to aye and gave notice that on the next meeting he would move to reconsider the question; that afterwards, and on the 29th day of November, 1901, at the next meeting of the board of fire commissioners, in accordance with the notice given at the last meeting, Commissioner Kuhrts moved to reconsider the motion made at the last meeting to grant to Caroline W. Dobbins a permit to erect gas works, which motion was lost by the following vote: No, Commissioners Webb, Vickery and Frankenfield; aye, Commissioner Kuhrts and Mayor Snyder; all of which will by the records of the said fire commissioners, now in the hands of the clerk of the said fire commissioners, or by a copy thereof, ready to be produced upon the trial hereof, more fully and at large appear.

And your orator further showeth unto your honors that immediately upon the granting of the said permit by the said board of fire commissioners to said Caroline W. Dobbins, and on the said 22nd day of November, 1901, said Valley Gas & Fuel Company, pursuant to its contract with the said Caroline W. Dobbins aforesaid, entered into divers and sundry contracts with divers and sundry persons for the erection of certain portions of said gas works, and more particularly with one C. J. Kubach, a builder and contractor in the city of Los Angeles, who then and there on said date,
13 commenced the laying of the cement foundation for the water tank and gas-holder, which was erected thereon by your orator under contract entered into between it and the said Valley Gas & Fuel Company aforesaid; that pursuant to said contract, the said C. J. Kubach, for the said Valley Gas & Fuel Company, laid the foundations for said gas-holder and water tank, and also the foundations for other portions of said works, at a cost of upwards of the sum of twenty-five hundred dollars ($2500); that said foundations are of great strength and of very costly material, and that if the same should have to be destroyed or removed, it would cause irreperable damage and injury, both to the said Caroline W. Dobbins, the Valley Gas & Fuel Company and to your orator as under the contract between your orator and the said Valley Gas & Fuel Company to erect thereupon the water tank and gas-holder aforesaid, your orator would not be able to complete said contract so entered into as aforesaid.

And your orator further shows unto your honors that on or about the 25th day of November, 1901, the city council of the city of Los Angeles attempted to pass a purported ordinance, purporting to be an ordinance entitled "An ordinance amending ordinance No. 6663, new series, entitled 'An ordinance prohibiting the erection or maintenance of gas works, gas tanks or reservoirs within certain portions of the city of Los Angeles,' approved August 26th, 1901, by amending section one of said ordinance" which said purported ordinance is in words and figures as follows:

Ordinance No. 6779.

(New series.)

An ordinance amending ordinance No. 6663, new series, entitled "An ordinance prohibiting the erection or maintenance of gas works, gas tanks or reservoirs within certain portions of the city of Los Angeles," approved August 26, 1901, by amending section 1 of said ordinance.

The mayor and council of the city of Los Angeles do ordain as follows:

14 SECTION 1. That section 1 of ordinance No. 6663, new series, entitled "An ordinance prohibiting the erection or maintenance of gas works, gas tanks, or reservoirs within certain portions of the city of Los Angeles," approved August 26th, 1901, be and the same is hereby amended to read as follows:

SECTION 1. It shall be unlawful for any person, firm or corporation to erect or cause to be erected, maintain or cause to be maintained, any works, establishment or manufactory for the manufacture of gas, or any tank, reservoir or other receptacle for the storage of gas within the corporate limits of the city of Los Angeles outside of the limits of the district described as follows, to wit:

Beginning at the intersection of the center line of the official bed of the Los Angeles river with the south charter boundary line of the city of Los Angeles; thence westerly along said south charter boundary line to the center line of Santa Fe avenue; thence northerly along the center line of Santa Fe avenue to the center line of Violet street; thence westerly along the center line of Violet street to the center line of Wilson street; thence northerly along the center line of Wilson street to the center line of Atlantic street; thence westerly along the center line of Atlantic street to the center line of Alameda street; thence northerly along the center line of Alameda street to the center line of Palmetto street; thence easterly along the center line of Palmetto street to the center line of Molino street; thence northerly along the center line of Molino street to the center line of Fourth street; thence easterly along the center line of Fourth street to the prolonged center line of Santa Fe avenue; thence northerly along said prolonged center line of Santa Fe avenue to the center line of First street; thence easterly along the center line of First street to the center line of Center street; thence northerly along the center line of Center street to the center line of Aliso street; thence westerly along the center line of Aliso street to the center line of Alameda street; thence northerly along the center line of Alameda street to the center line of San Fernando street; thence southeasterly following the line of the Southern Pacific railway on Redondo street and Alhambra avenue to the official bed of the Los Angeles river; thence southerly along the official bed of the Los Angeles river to the point of beginning.

SECTION 2. The city clerk shall certify to the passage of this ordinance and shall cause the same to be published once in the Los Angeles Daily Journal, and thereupon and thereafter it shall take effect and be in force.

I hereby certify that the foregoing ordinance was adopted by the council of the city of Los Angeles at its meeting of November 25th, 1901.

C. H. HANCE, *City Clerk.*

Approved this 26th day of November, 1901.

M. P. SNYDER, *Mayor.*

And your orator further shows that it is advised and therefore charges the fact to be, that said purported ordinance last hereinbefore set forth, attempted to be passed by the city council of the city of Los Angeles on the 25th day of November, 1901, is void and invalid in that it is uncertain, unreasonable, and is an attempt to regulate in an unlawful manner and without authority of law, the business of erecting gas works within the city of Los Angeles, and is

in violation of the rights of your orator secured to it by virtue of the contract entered into between it and the said Valley Gas & Fuel Company, and in violation of the rights granted to the said Caroline W. Dobbins by the city of Los Angeles, on the 22nd day of November, 1901, as aforesaid, and is in violation of the provisions of the Constitution of the United States prohibiting the passing of any law impairing the obligations of contracts.

And your orator further shows unto your honors that since the granting of the said permit to the said Caroline W. Dobbins
16 by the said board of fire commissioners of the city of Los Angeles on the 22nd day of November, 1901, as aforesaid, the said Valley Gas & Fuel Company has been carrying out its said contract with the said Caroline W. Dobbins, and until the commission of *of* the acts of the said defendant hereinafter set forth, has been peaceably and lawfully engaged in the erection of gas works upon the premises of the said Caroline W. Dobbins hereinbefore set forth; and your orator has been engaged upon said premises for the said Valley Gas & Fuel Company in carrying out its said contract with the said Valley Gas & Fuel Company and until the commission of the acts of the said defendant hereinafter set forth, has been peaceably and lawfully engaged in the erection of the water tank and gas-holder hereinbefore described, and until the 25th day of February, 1902, when the said city of Los Angeles, combining and confederating with one James R. C. Burton, and with divers and sundry persons, to your orator unknown, in the name of the People of the State of California, instituted a proceeding in the police court of the city of Los Angeles against one J. M. Smith and one Thaddeus Lowe then and there in the employ of the Valley Gas & Fuel Company in the erection of the said gas works on the premises of the said Caroline W. Dobbins hereinbefore described, in the carrying out of the said contract on behalf of the said Valley Gas & Fuel Company with the said Caroline W. Dobbins aforesaid, charging the said J. M. Smith and the said Thaddeus Lowe with having committed a misdemeanor in that they did wilfully and unlawfully erect and cause to be erected certain works, establishments and manufactory for the manufacture of gas, and a certain tank, reservoir and receptacle for the storage of gas within the corporate limits of said city of Los Angeles, described in the said purported ordinance attempted to be passed by the city council of the city of Los Angeles on the 25th day of November, 1901, last hereinbefore set forth; and thereupon, upon the complaint filed in said proceedings in the said police court
17 of the city of Los Angeles, on the 27th day of February, 1902, caused the arrest and detention of the said Thaddeus Lowe and the said J. M. Smith upon a warrant issued by the judge of the said police court of the city of Los Angeles, for the alleged violation of the said city ordinance; that on the first day of March 1902, the said city of Los Angeles likewise combining and confederating with the said James R. C. Burton, and with divers and sundry persons, to your orator unknown, in the name of the People of the State of California, instituted another proceeding in the police court of the city of Los Angeles against the said J. M. Smith, and the said

Thaddeus Lowe, and also against H. S. Stephens, W. H. Bolte, E. E. Miles and William A. Kennedy, then and there in the employ of the said Valley Gas & Fuel Company in the erection of the said gas works on the premises of the said Caroline W. Dobbins hereinbefore described, engaged in carrying out said contract on behalf of the said Valley Gas & Fuel Company with the said Caroline W. Dobbins aforesaid, charging the said J. M. Smith, the said Thaddeus Lowe, the said H. S. Stephens, the said W. H. Bolte, the said E. E. Miles and the said William A. Kennedy with having committed a misdemeanor in that they did wilfully and unlawfully erect and cause to be erected certain works, establishments and manufactory for the manufacture of gas, and a certain tank, reservoir and receptacle for the storage of gas within the corporate limits of said city of Los Angeles and outside of the limits of the alleged district described in said purported ordinance attempted to be passed by the city council of the city of Los Angeles on the 25th day of November, 1901, as hereinbefore set forth; and thereupon, upon the complaint filed in said proceeding in said police court of the city of Los Angeles on the first day of March, 1902, caused the arrest and detention of the said Thaddeus Lowe, J. M. Smith, H. S. Stephens, W. H. Bolte, E. E. Miles and William A. Kennedy upon the warrant issued by the judge of the said police court of the city of Los Angeles for the alleged violation of the said alleged ordinance;

18 that afterwards, on the first day of March, 1902, the said city of Los Angeles again combining and confederating with the said James R. C. Burton, and with divers and sundry other persons to your orator unknown, in the name of the People of the State of California, instituted another proceeding in the police court of the city of Los Angeles against the said J. M. Smith, Thaddeus Lowe, William Bolte, H. S. Stephens, W. A. Kennedy, E. E. Miles then and there in the employ of the Valley Gas & Fuel Company, and also Martin Daly, Thomas Malone, Thomas A. Scott, William Hoff, Ranson Colahan, W. B. Berner, E. V. Glasgow, Nolan J. Brestin, G. J. Odell and Elmer Edwards in the employ of your orator in the erection of the said gas works on the premises of the said Caroline W. Dobbins hereinbefore described, in the carrying out of the said contract between your orator and the said Valley Gas & Fuel Company, and of the said contract between the said Valley Gas & Fuel Company and the said Caroline W. Dobbins aforesaid, charging the said J. M. Smith, Thaddeus Lowe, William Bolte, H. S. Stephens, W. A. Kennedy, E. E. Miles, Martin Daly, Thomas Malone, Thomas A. Scott, William Hoff, Ranson Colahan, W. B. Berner, E. V. Glasgow, Nolan J. Brestin, G. J. Odell and Elmer Edwards with having committed a misdemeanor in that they did willfully and unlawfully erect and cause to be erected certain works, establishments and manufactory for the manufacture of gas and a certain tank, reservoir and receptacle for the storage of gas within the corporate limits of said city of Los Angeles, and outside of the limits of the district described in the said purported ordinance attempted to be passed by the city council of the city of Los Angeles on the 25th day of November, 1901, as hereinbefore set forth. And there-

upon, upon the complaint filed in said proceeding in the said police court of the city of Los Angeles, on the third day of March, 1902, that said city of Los Angeles caused the arrest and detention of the said Thaddeus Lowe, J. M. Smith, William Bolte, H. S. Stephens, W. A. Kennedy, E. E. Miles, Martin Daly, Thomas Malone, Thomas A. Scott, William Hoff, Ranson Colahan, W. B. Berner, E. V. Glasgow, Nolam J. Brestin, G. J. Odell and Elmer Edwards, upon the warrant issued by the judge of the said police court of the city of Los Angeles for the alleged violation of the said alleged city ordinance.

19 And your orator further shows unto your honors that the arrest and detention of the said employees of your orator, whose names are hereinbefore set forth, seriously interferred with and interrupted the work of your orator in carrying out said contract of your orator so entered into as aforesaid with the Valley Gas & Fuel Company, and was in violation of the rights of your orator as acquired under and by virtue of said contract.

And your orator further shows unto your honors that afterwards, on the 3rd day of March, 1902, the said city of Los Angeles recognizing the invalidity of the said alleged ordinance so by the common council of the city of Los Angeles attempted to be passed and adopted on the 25th day of November, 1901, as hereinbefore set forth, by its mayor and council, attempted to pass another purported ordinance entitled "An ordinance amending ordinance No. 6663, new series, entitled 'An ordinance prohibiting the erection or maintenance of gas works, gas tanks or reservoirs within certain portions of the city of Los Angeles,' approved August 26th, 1901, by amending section one of said ordinance," which said purported ordinance is in words and figures as follows:

Ordinance No. 7029.

(New series.)

An ordinance amending ordinance No. 6663, new series, entitled "An ordinance prohibiting the erection or maintenance of gas works, gas tanks, or reservoirs within certain portions of the city of Los Angeles," approved August 26, 1901, by amending section 1 of said ordinance.

The mayor and council of the city of Los Angeles do ordain as follows:

20 SECTION 1. That section 1, of ordinance No. 6663, new series, entitled, "An ordinance prohibiting the erection or maintenance of gas works, gas tanks or reservoirs within certain portions of the city of Los Angeles," approved August 26, 1901, be, and the same is hereby amended to read as follows:

SECTION 1. It shall be unlawful for any person, firm or corporation to erect or cause to be erected, maintain or cause to be maintained, any works, establishment or manufactory for the manufacture of gas; or any tank, reservoir or other receptacle for the storage of gas within the corporate limits of the city of Los Angeles, outside of the limits of the district described as follows, to wit:

Beginning at the intersection of the center line of the official bed of the Los Angeles river with the south charter boundary line of the city of Los Angeles; thence westerly along said south charter boundary line to the center line of Santa Fe avenue; thence northerly along the center line of Santa Fe avenue to the center line of Violet street; thence westerly along the center line of Violet street to the center line of Wilson avenue; thence northerly along the center line of Wilson avenue to the center line of Atlantic street; thence westerly along the center line of Atlantic street to the center line of Alameda street; thence northerly along the center line of Alameda street to the center line of Palmetto street; thence easterly along the center line of Palmetto street to the center line of Molino street; thence northerly along the center line of Molino street to the center line of Fourth street; thence easterly along the center line of Fourth street to the prolongation southerly of the center line of Santa Fe avenue; thence northerly along said prolonged center line of Santa Fe avenue and along the center line of Santa Fe avenue to the center line of First street; thence easterly along the center line of First street to the center line of Cen-
21 ter street; thence northerly along the center line of Center street to the center line of Aliso street; thence westerly along the center line of Aliso street to the center line of Alameda street; thence northerly along the center line of Alameda street to Main street; thence along Main street to the intersection of Main and San Fernando streets; thence northeasterly along the center line of San Fernando street to the center line of Redondo street; thence southeasterly, following the line of the Southern Pacific railway on Redondo street and Alhambra avenue to the official bed of the Los Angeles river; thence southerly along the official bed of the Los Angeles river to the point of beginning.

The avenue designated herein as Santa Fe avenue, is the avenue lying in the district bounded by the Los Angeles river on the east, and Alameda street on the west, and extending in a northerly and southerly direction between these two lines.

SECTION 2. The city clerk shall certify to the passage of this ordinance, and shall cause the same to be published once in the Los Angeles Daily Journal, and thereupon and thereafter it shall take effect and be in force.

I hereby certify that the foregoing ordinance was adopted by the council of the city of Los Angeles at its meeting of March 3rd, 1902.

C. H. HANCE, *City Clerk.*

Approved this 3rd day of March, 1902.

M. P. SNYDER, *Mayor.*

And your orator further shows unto your honors that it is advised and therefore charges the fact to be that said purported ordinance last herein set forth, attempted to be passed by the city council of the city of Los Angeles on the 3rd day of March, 1902, is void and invalid in that it is uncertain and unreasonable, and is an

attempt to regulate in an unlawful manner and without
22 authority the business of erecting gas works within the city of Los Angeles and is in violation of the rights of your orator, secured to it by virtue of the contract entered into between it and the said Valley Gas & Fuel Company, and in violation of the rights secured to the said Caroline W. Dobbins by the city of Los Angeles on the 22nd day of November, 1901, as aforesaid, and is in violation of the provisions of the Constitution of the United States prohibiting the passing of any law impairing the obligation of contracts.

And your orator further shows that said alleged ordinance last hereinbefore set forth was on the 3rd day of March, 1902, approved by the mayor of the city of Los Angeles, and was afterwards, on the 5th day of March, 1902, published in the Los Angeles Daily Journal as in and by said alleged ordinance provided; and your orator is advised and therefore so charges the fact to be, that if said ordinance is a valid ordinance in so far it may have been regularly adopted by the city council of the city of Los Angeles and approved by the mayor and published in the Los Angeles Daily Journal as aforesaid, that the same repealed the alleged ordinance heretofore attempted to be passed by the city council of the city of Los Angeles on the 25th day of November, 1901, and that said ordinance of November 25th, 1901, as hereinbefore set forth, is thereby made no longer of any force and effect.

And your orator further shows unto your honors that your orator is now endeavoring in all respects to carry out and perform its contract with the Valley Gas & Fuel Company, and to erect on the premises of the said Caroline W. Dobbins, hereinbefore described, the said water tank and gas-holder provided for in the contract between your orator and the said Valley Gas & Fuel Company, to be used in the erection of the gas works by the Valley Gas & Fuel Company for the said Caroline W. Dobbins as aforesaid; but that the said city of Los Angeles again combining and con-
federating with the said James R. C. Burton and with divers
23 and sundry persons to your orator unknown, threatens in the name of the People of the State of California to institute another proceeding in the police court of the city of Los Angeles against the said Thaddeus Lowe, J. M. Smith and Martin Daly, and the other men whose names are hereinbefore mentioned as the employees of your orator, and other persons engaged in the erection of said gas works on the premises of the said Caroline W. Dobbins, in the employ of the Valley Gas & Fuel Company, in carrying out said contract on behalf of the said Valley Gas & Fuel Company, with the said Caroline W. Dobbins, threatens to charge the said Thaddeus Lowe, J. M. Smith, Martin Daly and other employees of your orator with having com-itted a misdemeanor, charging them and each of them with wilfully and unlawfully erecting or causing to be erected certain works, establishments and manufactory for the manufacture of gas, and a certain tank, reservoir and receptacle for the storage of gas, within the corporate limits of said city of Los Angeles, and outside of the limits described in said purported ordinance attempted to be passed by the said council of the city of Los Angeles on the

3rd day of March, 1902, last hereinbefore set forth; and the said city of Los Angeles now threatens to cause the arrest and detention of the said Thaddeus Lowe, the said J. M. Smith, the said Martin Daly and all the other employees of your orator engaged in the erection and construction of the said water tank and gas-holder as hereinbefore set forth, and to imprison and confine the said employees of your orator for the alleged violation of the said alleged city ordinance.

And your orator further shows unto your honors that the said city of Los Angeles threatens, that if your orator continues to carry on its work in which it is engaged in completing the said water tank and gas-holder under its contract with the said Valley Gas & Fuel Company, that it will arrest all persons employed by your orator and engaged in said work, until it will have
24 stopped the business of your orator and the performance by your orator of its work in carrying out its said contract, and will arrest the men employed by your orator as often as they shall be found at work for your orator upon said undertaking, charging them with the violation of the alleged ordinance last aforesaid, and unless the said city of Los Angeles is restrained and enjoined by this court from executing its said threats that the said city of Los Angeles will arrest and continue to arrest the men employed by your orator in conducting its said business in the erection of the said water tank and gas-holder and in the carrying out of its said contract with the said Valley Gas & Fuel Company, so entered into as aforesaid, until said work is stopped.

And your orator further showeth unto your honors that if said city of Los Angeles shall be allowed to arrest, and to continue to arrest the employees of your orator so engaged by it in the building of said water tank and gas-holder, and in carrying out its contract with the Valley Gas & Fuel Company aforesaid, and if the said city of Los Angeles is allowed to carry its threats into execution, that your orator would suffer great and irreperable loss; that the work already performed by your orator in the carrying out of said contract consists of the being placed upon the grounds of the said Caroline W. Dobbins, hereinbefore described, a large quantity of steel plates ready to be put in place in said water tank and gas-holder, and of having partially erected on said premises the water tank as hereinbefore set forth, all of which are exposed to the elements and unprotected and in eminent danger of being utterly destroyed by the action of the elements, and are of great value to your orator, costing upwards of the sum of eight thousand dollars ($8000); that your orator has been forced to employ in the construction of said water tank and gas-holder skilled mechanics and has brought them from divers and sundry places, at great distances from the city of Los Angeles, as hereinbefore set forth, and that if said city is allowed to
25 execute its said threats of arresting said men, said men threaten to and will leave the employment of your orator; and if said work shall be retarded and interrupted by reason of the said threats and execution thereof by the said city of Los Angeles, as it will if said threats are executed, the said skilled laborers and

mechanics so employed by your orator will become scattered and your orator will not be able again to obtain their services, or the services of like men in such employment; all of which would cause your orator such great and irreperable damages that your orator would have no adequate remedy at law, and would not be able to carry out the contract entered into between your orator and the said Valley Gas & Fuel Company, and would result in innumerable actions at law and a multiplicity of suits, which would have to be instituted at great expense, and all without any possibility of your orator recovering indemnity for said expenses; that your orator has already done work in carrying out said contract amounting to upwards of the sum of nine thousand dollars ($9000) and has only received on account thereof the sum of about three thousand dollars ($3000) and could not and would not be able to recover the sums of money already expended by it, and the expenses incurred by it in attempting to carry out its said lawful contract with the said Valley Gas & Fuel Company, as it would not on its part be able to fulfill and carry out the same according to the terms thereof; that the damages sustained by your orator, if unable to complete said contract hereinbefore set forth would be upwards of the sum of ten thousand dollars ($10,000).

And your orator further showeth unto your honors that it had well hoped that it would be permitted, as it had a right to do, to carry out the said contract with the said Valley Gas & Fuel Company, and fulfill the same without any interruption from any person or persons whomsoever; but that the said city of Los
26 Angeles combining and confederating with divers and sundry persons to your orator unknown, has so attempted to, and has interferred with the rights of your orator, and with the prosecution of the work undertaken by your orator as aforesaid, in the carrying out of its said contract with the Valley Gas & Fuel Company as aforesaid, and the said city of Los Angeles threatens and intends to proceed against your orator and its said employees, until your orator is compelled to desist from the completion of said contract, all of which acts and doings on the part of the said city of Los Angeles are in violation of the rights of your orator and contrary to equity and good conscience.

And your orator further showeth unto your honors that the said city of Los Angeles ought to be restrained and enjoined from carrying out its said threats and from interferring with the work of your orator in the carrying out of its said contract with the said Valley Gas & Fuel Company in the erection of said water tank and gas-holder as aforesaid; and your orater is advised that it is entitled to, and therefore claims the aid of this honorable court enjoining and restraining the said defendant, its officers, agents and employees, and all persons combining and confederating with it, and each and every of them, from enforcing the said alleged ordinances hereinbefore set forth against your orator, or any of its agents, servants or employees, and preventing your orator from carrying out and prosecuting the said work of erecting the said water tank and gas-holder upon the premises of the said Caroline W. Dobbins, hereinbefore

described, in pursuance of its contract with the said Valley Gas and Fuel Company as hereinbefore set forth; and from in any manner interferring, retarding, interrupting or stopping the work of your orator, or its agents, servants or employees in carrying out said contract.

In tender consideration whereof and forasmuch as your orator is otherwise remediless save in a court of equity where such matters are properly relievable and cognizable. To the end therefore,
27 the said City of Los Angeles may be made a party defendant to this your orator's bill of complaint, and may answer the same, but not under oath, its answer under oath being hereby expressly waived, and may full, true, perfect and direct answer make, and may show, if it can, by what authority or right it should interfere with your orator in its completion and carrying out of its said contract with the Valley Gas & Fuel Company, and that the said defendant may answer and set forth to the best of its knowledge, information or belief, the name and names of all persons, associations or corporations with which it has been combining, and confederating in its attempt to interfere with your orator in the prosecution of its said contract with said Valley Gas & Fuel Company as hereinbefore set forth; and that the said persons, when so discovered, may be made parties defendant to this your orator's bill of complaint and answer the same as if their names were inserted herein at this time specifically with proper allegations to charge them; and whether the Los Angeles Lighting Company, a corporation organized and doing business under the laws of the State of California, in the city of Los Angeles, or any of its agents, counsellors, attorneys, servants or employees have aided, or abet-ed, or combined or confederated with the said defendant or with any of its agents, officers or employees, in its interference with the work of your orator in carrying out said contracts with the Valley Gas & Fuel Company in the erection of said water tank and gas-holder, and where and in what manner the said Los Angeles Lighting Company, its agents, counsellors, attorneys, servants and employees so aided, abet-ed, confederated and combined with the said city of Los Angeles aforesaid, or with its agents, officers or employees, and whether the said Los Angeles Lighting Company, its agents, counsellors, attorneys, servants or employees, or any other person acting for or in behalf of said Los Angeles Lighting Company at the instigation or direction of the said Los Angeles Lighting Company, aided or abet-ed
28 in the prosecution of the said proceedings instituted in the name of the People of the State of California against the said employees of your orator as hereinbefore set forth.

That upon the hearing hereof that a temporary injunction may be issued enjoining and restraining the said defendant, The City of Los Angeles, its counsellors, attorneys, solicitors, officers, agents and employees and all persons combining and confederating with it and each and every of them, from enforcing the said alleged ordinance number 6779, new series, attempted to be adopted the 25th day of November, 1901, and entitled "An ordinance amending an ordinance No. 6663, new series, entitled 'An ordinance prohibiting the erection

or maintenance of gas works, gas tanks or reservoirs within certain portions of the city of Los Angeles' approved August 26th, 1901, by amending section one of said ordinance;" or enforcing the said alleged ordinance number 7029, new series, entitled "An ordinance amending ordinance No. 6663, new series, entitled 'An ordinance prohibiting the erection or maintenance of gas works, gas tanks or reservoirs within certain portions of the city of Los Angeles,' approved August 26th, 1901, by amending section one of said ordinance," against your orator or any of its agents, servants or employees, and from preventing your orator from carrying out and prosecuring the said work of erecting the said water tank and gas-holder upon the terms in said bill of complaint described, situated in the city of Los Angeles, and State of California, to wit: All of lots sixteen, seventeen and eighteen of block two, Pomeroy & Mills' subdivision of the Hollenbeck tract, as per map recorded in Book 5, page 199 miscellaneous records of said Los Angeles county, in pursuance of its contract with the said Valley Gas & Fuel Company, as hereinbefore set forth, and from any manner interfering, retarding,
29 interrupting or stopping the work of your orator or its agents, servants, or employees in carrying out said contract or in completing said work. And that on the hearing hereof that said defendant, its counsellors, attorneys, officers, agents and employees, and all persons combining and confederating with it, and each and every of them, may be perpetually enjoined from doing any of the acts last hereinbefore specifically set forth; and that your orator may have such other and further relief as the nature of the circumstances of this case may require, and as to your honors shall seem meet, *the*

May it please your honors, the premises considered, to grant unto your orator a writ of injunction issuing out of and under the seal of this honorable court, to be directed to the said City of Los Angeles, its counsellors, attorneys, solicitors, officers, agents and employees, and all persons combining and confederating with it, and each and every of them, commanding them and each of them absolutely to desist and refrain from enforcing the said alleged ordinance number 6779, new series, attempted to be adopted the 25th day of November, 1901, and entitled "An ordinance amending ordinance No. 66-3, new series, entitled 'An ordinance prohibiting the erection or maintenance of gas works, gas tanks or reservoirs within certain portions of the city of Los Angeles,' approved August 26th, 1901, by amending section one of said ordinance," or enforcing the said alleged ordinance number 7029, new series, entitled "An ordinance amending ordinance No. 6663, new series, entitled 'An ordinance prohibiting the erection or maintenance of gas works, gas tanks or reservoirs within certain portions of the city of Los Angeles,' approved August 26th, 1901, by amending section one of said ordinance," against your orator or any of its agents, servants or employees, and from preventing your orator from carrying out and prosecuting the said work of erecting the said water tank and gas-holder upon the terms in said bill of complaint described, situated in the city of Los Angeles, and State of California, to wit: All of lots sixteen, seventeen and

30 eighteen of block two, Pomeroy & Mills' subdivision of the Hollenbeck tract, as per map recorded in Book 5, page 199 miscellaneous records of said Los Angeles county, in pursuance of its contract with the said Valley Gas & Fuel Company, as hereinbefore set forth, and from any manner interferring, retarding, interrupting or stopping the work of your orator or its agents, servants or employees in carrying out said contract or in completing said work.

May it please your honors, the premises considered, to grant unto your orator not only the writ of injunction heretofore asked for, but also a writ of subpœna to be directed to the said City of Los Angeles, commanding it at a certain time and under a certain penalty therein to be named, personally to be and appear before this honorable court, and then and there full, true and perfect answer make to all and singular the premises, and to stand to, abide by, and perform such further order and decree in the premises as to this honorable court shall seem meet and agreeable to equity and good conscience. And your orator will ever pray, etc.

DAVIS & FARNUM MANUFACTURING COMPANY,
By ORLANDO MAINES, *Their Agent.*

LYNN HELM,
LEE, SCOTT, BAILEY & CHASE,
Solicitors for said Complainant.

UNITED STATES OF AMERICA,
Southern District of California, Southern Division, } ss:

Orlando Maines, being duly sworn upon oath, deposes and says: That he is the authorized agent of The Davis & Farnum Manufacturing Company, the complainant in the foregoing action; that as such all the matters and things in the said bill of complaint set
31 forth are within his own personal knowledge; that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge.

ORLANDO MAINES.

Subscribed and sworn to before me this 6th day of March, A. D. 1902.

WM. M. VAN DYKE,
Clerk U. S. Circuit Court, Southern District of California,
[SEAL.] By CHAS. N. WILLIAMS, *Deputy.*

(Endorsed:) No. 1015. In the circuit court of the United States, ninth circuit, southern district of California, southern division. Davis & Farnum Manufacturing Company, a corporation, plaintiff, vs. The City of Los Angeles, a municipal corporation, defendant. Bill of complaint. Filed Mar. 6 1902 Wm. M. Van Dyke, clerk Chas. N. Williams, deputy Lynn Helm and Lee, Scott, Bailey & Chase, attorney- for complainant, Los Angeles, California.

32 UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division. In Equity.

The President of the United States of America to the City of Los Angeles, a municipal corporation, Greeting:

You are hereby commanded, that you be and appear in said circuit court of the United States aforesaid, at the court-room in Los Angeles, on the 7th day of April, A. D. 1902, to answer a bill of complaint exhibited against you in said court by the Davis & Farnum Manufacturing Company, a corporation, duly organized and doing business under and by virtue of the laws of the State of Massachusetts, and a citizen of the State of Massachusetts, and to do and receive what the said court shall have considered in that behalf. And this you are not to omit, under the penalty of five thousand dollars.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 7th day of March, in the year of our Lord one thousand nine hundred and two, and of our Independence the one hundred and twenty-sixth.

[SEAL.] WM. M. VAN DYKE, *Clerk.*

Memorandum Pursuant to Rule 12, *Supreme Court U. S.*

You are hereby required, to enter your appearance in the above suit, on or before the first Monday of April next, at the clerk's office of said court pursuant to said bill; otherwise the said bill will be taken *pro confesso.*

WM. M. VAN DYKE, *Clerk.*

Clerk's office: Los Angeles, California.

33 UNITED STATES MARSHAL'S OFFICE, }
Southern District of California. }

I hereby certify, that I received the within writ on the 7th day of March, 1902, and personally served the same on the 7th day of March, 1902, on The City of Los Angeles, (a corporation), by delivering to and leaving with M. P. Snyder, mayor of The City of Los Angeles, said defendant named therein, personally, at the county of Los Angeles, in said district, a certified copy thereof.

H. Z. OSBORNE,
U. S. Marshal,
By G. F. McCULLOCH, *Deputy.*

Los Angeles, March 7th, 1902.

(Endorsed:) Original. Marshal's doc. No. 449. No. 1015. U. S. circuit court, ninth circuit, southern district of California. Southern division. In equity. Davis & Farnum Manufacturing Company,

vs. The City of Los Angeles, a municipal corporation. Subpœna. Filed Mar 7 1902 Wm. M. Van Dyke, clerk Chas. N. Williams, deputy.

34 In the Circuit Court of the United States in and for the Southern District of California, Southern Division.

DAVIS & FARNUM MANUFACTURING COMPANY, a Corporation, Plaintiff,
vs.
THE CITY OF LOS ANGELES, a Municipal Corporation, Defendant.

And now comes the said plaintiff by leave of court first had and obtained and files this amendment to its bill of complaint filed herein on the 6th day of March, 1902, by inserting therein at the end of line thirteen, page twenty-three the following paragraphs:

And your orator further shows unto your honors that it is informed and believes and charges the fact to be, that ever since the inception of said enterprise instituted, commenced and undertaken by the said Caroline W. Dobbins, about the first day of August, 1901, the said defendant, The City of Los Angeles and the municipal authorities thereof, its officers and agents, have continuously thrown obstacles in the way of the successful completion of the said enterprise of the said Caroline W. Dobbins, and have continuously and systematically attempted to, thwart and frustrate her plans and have interferred with and interrupted her said work in various portions thereof; that immediately after the organization, at the instance of, and for the benefit of the said Caroline W. Dobbins of the said Valley Gas & Fuel Company, the said city council of the city of Los Angeles attempted to pass and adopt the ordinance No. 6663, new series, which was adopted on the 26th day of August, 1901, as aforesaid, entitled "An ordinance prohibiting the erection or maintenance of gas works, gas tanks or reservoirs within certain portions of the city of Los
35 Angeles;" and afterwards, when the said Caroline W. Dobbins had purchased within the district prescribed by said ordinance last hereinbefore referred to, the lands upon which she proposed to erect said gas works, and when on or about the 28th day of September, 1901, an application had been made to the board of fire commissioners of the city of Los Angeles for a permit to erect gas works upon said premises, the said city council of the city of Los Angeles considered and deliberated upon an ordinance then and there introduced to said city council of the city of Los Angeles entitled "An ordinance amending ordinance No. 6663, new series, entitled 'An ordinance prohibiting the erection or maintenance of gas works, gas tanks or reservoirs within certain portions of the city of Los Angeles' approved August 26th, 1901, by amending section one of said ordinance," the object of said proposed ordinance being to further restrict the limits of the district in the city of Los Angeles in which it was lawful to erect and maintain gas works, by which said ordinance it was proposed to eliminate from the district theretofore described in the said alleged ordinance adopted on

the 26th day of August, 1901, all that portion of said district lying between San Fernando street on the north and west, Sotello and Leroy streets on the south and west and the Los Angeles river on the east, in which was particularly situated the land owned and purchased by the said Caroline W. Dobbins as aforesaid, and upon which it was proposed by the said Caroline W. Dobbins to erect the said gas works; that such proceedings were had in the said city council of the city of Los Angeles on the presentation and consideration of said ordinance that the same was by the said city council referred to the committee on legislation of said city council, and thereupon the hearing on the application theretofore made to the said board of fire commissioners was suspended and the same entirely suspended by the said board of fire commissioners while the said matter was pending before the said committee on legislation of the said
36 council of the said city of Los Angeles, and for upwards of two weeks; that during the time that said application for permit to erect gas works on the premises of said Caroline W. Dobbins above referred to, was still pending before the said board of fire commissioners as aforesaid, and while the question of the adoption of the said proposed ordinance was still pending before the said legislative committee of the said city council, the said board of fire commissioners were induced to consider, and did consider and agreed to the adoption of a certain rule and regulation in reference to applications for permits to erect gas works, which said rule and regulation is hereinafter referred to; that after such determination of the said board of fire commissioners to adopt said rule and regulation hereinafter referred to, said proposed ordinance proposing to restrict the limits of said district in which it was lawful to erect gas works as aforesaid, came before the city council of the city of Los Angeles on the report of said legislative committee, the said legislative committee having reported against the adoption of said ordinance; and thereupon, at the meeting of said board of fire commissioners of the said city of Los Angeles, said rule and regulation hereinafter referred to having theretofore been considered by said board of fire commissioners as aforesaid, was at the meeting of the board of fire commissioners on or about the 25th day of October, 1901, adopted in words and figures as follows: "Whereas, applications are on file with this board for permission to erect gas-manufacturing plants at different points within the district to which said plants are limited; and whereas, a very great majority of the property-owners living in the vicinity of locations for which applications are made protest against the granting of permits; and whereas, this board is satisfied that the respective applications for permission to build are attempting to engage in the business of the distribution of gas for general purposes, including its use for fuel and power,
37 without first procuring a franchise from the city for said right; now, therefore, be it resolved, that all applications now pending before this board for permission to erect gas-manufacturing plants are hereby denied; that, hereafter, in all cases where an application for permission to erect gas-manufacturing plant shall be

made to this commission, the said application shall state whether or not the gas so manufactured is to be supplied to the inhabitants of the city of Los Angeles for illuminating purposes only. Said application shall be verified by the oath of the applicant, and in case it shall appear to the commission that no proper ground exists for the denial of the application, and that said gas is to be used for illuminating purposes only, the same shall be forthwith granted. But in case it shall appear that the gas is to be furnished for general purposes, such as fuel, power, etc., then the applicant therefore must procure a franchise from the city of Los Angeles to distribute gas before his said application will be finally granted by this commission." The effect of which rule was to dismiss and deny the application theretofore made for permission to erect gas works upon the premises of the said Caroline W. Dobbins as hereinbefore set forth; that afterwards, on the first day of November, 1901, the said Caroline W. Dobbins having complied with all the rules and regulations of the said board of fire commissioners, made an application on her own behalf for a permit to erect gas works upon said premises hereinbefore described, and afterwards, on the 22nd day of November, 1901, the said board of fire commissioners granted the said permit to the said Caroline W. Dobbins as hereinbefore set forth; and thereupon the said city council of the city of Los Angeles, as soon thereafter as they met, to wit, on the 25th day of November, 1901, attempted to pass and adopt the said ordinance No. 6779, new series, entitled "An ordinance amending ordinance No. 6663, new series, entitled 'An ordinance prohibiting the erection or maintenance of gas works, gas tanks or reservoirs within certain
38 portions of the city of Los Angeles,' approved August 26th, 1901, by amending section one of said ordinance," as hereinbefore set forth; but in addition to the acts of the said municipal authorities of the said city of Los Angeles hereinbefore set forth, on or about the 7th day of October, 1901, the city council of the city of Los Angeles attempted to pass another certain purported ordinance known as No. 6726, new series, entitled "An ordinance prohibiting the use of any public street or thoroughfare in the city of Los Angeles for the purpose of laying down or maintaining therein any pipe, conduit or connections therewith, without a franchise," wherein and whereby the said city of Los Angeles attempted to ordain that it should be unlawful for any person, firm or corporation to lay down any pipe, conduit or connections therewith, in any public street or thoroughfare in the city of Los Angeles, for the purpose of supplying the said city or its inhabitants with fresh water or gas used exclusively for illumination, or with other illuminating light, without first obtaining a permit from the superintendent of streets to make the necessary excavations therefor; and that any person, firm or corporation desiring to obtain such permit should file with the superintendent of streets an application therefor in writing, setting forth the public streets or thoroughfares and the particular portions thereof which it was desiring to excavate, the size and character of the excavation to be made and specific purpose for which the pipe, conduit or connections therewith was to be used, whether

for water, gas or electricity, and if for gas or electricity, that said gas or electricity was to be supplied solely to said city or its inhabitants, to be used exclusively for illumination and that said application must be verified by the oath of said person, or by an oath of the member of said firm, or by the oath of the president and secretary of said corporation, as the case may be; that thereafter, when the said Caroline W. Dobbins desired to make an application for a permit to excavate the streets of
39 the city of Los Angeles for the purpose of laying pipe in order to distribute to the citizens of the city of Los Angeles gas by her to be manufactured for the purpose of supplying them with artificial light, the superintendent of streets of the city of Los Angeles unlawfully required of the said Caroline W. Dobbins an application therefor in writing, setting forth the public streets and thoroughfares and the particular portions thereof, which was desired by the said Caroline W. Dobbins to excavate, the size and character of the excavations to be made and the specific purpose for which the pipe, conduit or connections therewith was to be used, and that said gas was to be supplied solely to the city or its inhabitants exclusively for illumination, and required that the said application should be verified by the oath of the said Caroline W. Dobbins, all of which requirements were unlawful, and were for the purpose of annoying, harassing, impeding, hindering and delaying the said Caroline W. Dobbins in her attempt to carry out successfully the lawful enterprise in which she was engaged; that thereafter, in addition to the adoption of the said purported ordinances so attempted to be adopted by the city council of the city of Los Angeles, and in addition to the acts of the said superintendent of streets of the city of Los Angeles hereinbefore set forth, the said city of Los Angeles, through its city attorney, prosecuted the proceedings instituted by the said J. R. C. Burton hereinbefore set forth, for the arrest of, and detention of the men employed in the construction and erection of the said gas works of the said Caroline W. Dobbins and in the employ of your orator, in the construction of said water tank and gas-holder, all of which acts and doings on the part of the city of Los Angeles, its municipal authorities, officers and agents, as hereinbefore set forth, your orator charges and avers were for the purpose of hindering, harassing, impeding, delaying and frustrating the efforts and attempts of the said Caroline W. Dobbins to carry out the
40 lawful business and enterprise so undertaken by her as aforesaid, and were instituted and prosecuted for the purpose of compelling the said Caroline W. Dobbins to stop and abandon the further prosecution of such enterprise.

And your orator further showeth unto your honors that it is informed and believes, and so charges the fact to be, that the said defendant, The City of Los Angeles, the municipal authorities and employees thereof, were in their acts and doings hereinbefore set forth wilfully and unlawfully instigated, advised and controlled by the officers, attorneys, agents and employees of the Los Angeles Lighting Company, a corporation organized under the laws of the State of California, with its principal office in the city of Los Ange-

les, engaged in the manufacture and supplying of gas in the city of Los Angeles, and which said company for upwards of ten years last past has enjoyed a monopoly of the gas business in the city of Los Angeles; that said Los Angeles Lighting Company through its officers, attorneys, agents and employees has had sufficient influence with the municipal government of the city of Los Angeles, and with its office-s, to bring about the passage and adoption of the alleged ordinances hereinbefore set forth, which the said city council of the city of Los Angeles has attempted to adopt since the commencement of the enterprise attempted by the said Caroline W. Dobbins, and has had sufficient influence with the officers and employees of the said city of Los Angeles to compel them to enforce and attempt to enforce the alleged ordinances so attempted to be passed and adopted by the city council of the city of Los Angeles as aforesaid, against the said Caroline W. Dobbins, her agents, contractors and employees engaged in the erection of said gas works, and the laying of pipes in the streets of the city of Los Angeles on behalf of the said Caroline W. Dobbins, in enabling her to carry out the enterprise as aforesaid; that all of said ordinances attempted to be passed and adopted by the said council of the city of Los Angeles
41 restricting the limits of the city of Los Angeles in which it was lawful to erect gas works, as prescribed by the ordinance adopted by the council of the city of Los Angeles on the 26th day of August, 1901, hereinbefore set forth, were prepared by the attorneys and agents of the said Los Angeles Lighting Company and by them presented to the members of the city council of the city of Los Angeles for adoption; that before the attempted adoption of the said alleged ordinance of the 25th day of November, 1901, hereinbefore set forth, the said Los Angeles Lighting Company through its attorneys and agents, in order to comply with the rules of the said city council, that before the passage of any ordinance a printed copy thereof should be furnished to each of the members of the city council of the city of Los Angeles, caused to be printed and distributed to the members of the city council of the city of Los Angeles printed copies of the proposed ordinance which the said city council afterwards on the 25th day of November, 1901, attempted to adopt and pass as aforesaid; that the said street superintendent of the city of Los Angeles, under the restrictions purporting to be placed upon him by the said council of the city of Los Angeles by the attempted adoption of the alleged ordinance No. 6726, new series, last herein referred to, being compelled to demand of the said Caroline W. Dobbins a verified application for a permit to open the streets of the city of Los Angeles for the purpose of laying pipes therein for the purpose of distributing gas by her to be manufactured, contrary to the rights of the said Caroline W. Dobbins to use the streets of the said city of Los Angeles for the purpose of laying pipes therein, as guaranteed to her by section 19, article 11 of the constitution of the State of California; that thereupon the said Los Angeles Lighting Company, its agents and employees, printed and caused to be delivered by its agent to said superintendent of streets of the city of Los Angeles, printed blanks prepared by their attor-

neys, for application for permits to excavate in public streets in the city of Los Angeles, a copy of which blank is
42 hereto attached and marked Exhibit "A," and made a part hereof as though hereinafter specifically set forth, reference thereunto being had; that the said Los Angeles Lighting Company, its officers and agents, combining and confederating with the said J. R. C. Burton, and with divers and sundry persons to your orator unknown, have compelled the city attorney of the city of Los Angeles, and his deputies and assistants, to prepare the complaints in the proceedings instituted by the said J. R. C. Burton in the name of the People of the State of California against the employees of your orator and the other contractors of the said Caroline W. Dobbins, engaged in the erection of said gas works as hereinbefore set forth; and have instituted the filing of said complaints and the issuance of the warrants thereon, and the arrest and imprisonment and detention by the officers of the city of Los Angeles, of the said employees; and that the said Los Angeles Lighting Company, by its officers, attorneys, agents and employees, has boasted and threatened that if the said proceedings so instituted by the said J. R. C. Burton against the employees of your orator and the other contractors of the said Caroline W. Dobbins shall fail, and if the said ordinances hereinbefore set forth shall be declared void and invalid, that they will by their influence and efforts secure the passage by the city council of the city of Los Angeles of an ordinance regulating the gas business of the city of Los Angeles and requiring the payment of a license, which license they have boasted and threatened shall be prohibitory in its nature and so high as to prevent the said Caroline W. Dobbins from carrying on said business of manufacturing and distributing gas within the city of Los Angeles.

And your orator charges the fact to be, that each and every of the acts aforesaid so permitted by the city of Los Angeles, its officers, agents and employees, were done and permitted, not for the purpose of protecting any public interest or preserving any public
43 right, but that said acts and each of them were, as your orator is informed and believes, suggested and formulated by the said Los Angeles Lighting Company, its officers, attorneys, agents and employees, solely for the purpose of protecting said Los Angeles Lighting Company in the enjoyment of that monopoly which has continued for upwards of ten years, as hereinbefore alleged, and for the purpose of depriving the said Caroline W. Dobbins of vested rights in property and of the privilege of pursuing her lawful undertaking and enterprise as the same is hereinbefore specifically set forth, and for the purpose of compelling your orator to desist from the erection of said water tank and gas-holder under its contract hereinbefore set forth, in the exercise of which rights and privileges your orator and the said Caroline W. Dobbins, is protected by the provisions of the Constitution of the United States.

And your orator further shows unto your honors that the said territory surrounding the premises of the said Caroline W. Dobbins hereinbefore described, in which the said gas works of the said Caroline W. Dobbins are being erected, and which was by ordinance

No. 6663, new series, hereinbefore set forth, a portion of the territory within which the city of Los Angeles permitted the maintenance of gas works, is and was a district devoted to manufacturing and commercial enterprises almost exclusively; that in said district, prior to the purchase of the property hereinbefore described by the said Caroline W. Dobbins, and upon which the said gas works are being erected by the said Caroline W. Dobbins aforesaid, there was in operation a soap factory; that at all times since the first day of August, 1901, there has been and is now maintained in the district bounded by Redondo and Alhambra streets, the Los Angeles river, and San Fernando streets in the city of Los Angeles, one wool-pulling factory, which is directly across North Main street from the said premises of the said Caroline W. Dobbins, three wineries, numerous oil wells in operation or drilling, and extensive iron foundry in active oper-
44 ation, a brass foundry and an extensive oil factory; that there is a great deal of vacant and unoccupied land which is and will continue to be apparently worthless except for the purpose of erecting thereon manufacturing establishments; that immediately adjacent to the easterly line of said district last hereinbefore described, are the tracks of the Southern California Railway Company on which are operated the freight and passenger trains of the Santa Fe railroad; that east of that and adjacent thereto, is the Los Angeles river, and that east thereof is the right of way and the tracks of the San Pedro, Los Angeles & Salt Lake railroad; that immediately east of those tracts, an extensive tannery is located and in operation; that immediately north of said district and north of San Fernando street and adjacent to the tracks of the Santa Fe railroad are the oil tanks and refineries of the Standard Oil Company in extensive operation; that prior to the granting of the permit by the board of fire commissioners of the city of Los Angeles to the said Caroline W. Dobbins on the 22nd day of November, 1901, the said board of fire commissioners and the members of said commission individually and jointly visited and examined the said premises and the said district surrounding the same, and having heard the protests of all persons who appeared before them, decided and admitted by the granting of said permit that said premises were in all respects a suitable place upon which to erect the said gas works and conduct the business of manufacturing gas.

And your orator further shows that said gas works are being constructed and are to be completed upon concrete foundations with a superstructure of brick, steel and iron of the best material procurable, and are not combustible, and that the same are so firmly and substantially constructed that there can be no danger from explosion, bursting or leakage; that all the machinery now in place therein, or to be placed therein, is of the most approved pat-
tern and constructed in accordance with the latest devices
45 and improvements known in the manufacture of gas; that said works can be, or ought to be operated and maintained by the said Caroline W. Dobbins, by the use of said devices and improvements, and the said machinery therein contained, so that there will be no leakage or escape of odors, and that the same will

not create a nuisance and will not interfere in any way with the health, comfort, safety or welfare of the said inhabitants of the said district and territory in which said gas works are located or of any other of the inhabitants of the said city of Los Angeles.

And your orator further showeth unto your honors by way of supplement that since the filing of said original bill herein, the said city of Los Angeles again combining and confederating with the said J. R. C. Burton, and with divers and sundry persons to your orator unknown, in the name of the People of the State of California instituted another proceeding in the police court of the city of Los Angeles against Thaddeus Lowe, F. A. Smith, M. Daly, R. Solahan, A. Burgess, W. B. Verner, F. Mullen, E. V. Glasgow, J. Ryan, J. Pelo, P. Hussey, R. J. Nieto, C. H. Tyler, W. Huff, T. A. Sealt, W. Bastock, W. Nolan, H. S. Malone, J. I. Alvarez, A. J. Shaw, M. Ortlip, J. Breslin, G. O'Dell, E. E. Miles, the said Thaddeus Lowe and the said F. S. Smith being in the employ of the Valley Gas & Fuel Company, and all of the other of said persons being in the employ of your orator in the erection of said gas works on the premises of the said Caroline W. Dobbins in the carrying out of said contract between your orator and the said Valley Gas & Fuel Company and of the contract between said Valley Gas & Fuel Company and the said Caroline W. Dobbins, charging the said Thaddeus Lowe, the said F. A. Smith, M. Daly, R. Colahan, A. Burgess, W. B. Verner, F. Mullen, E. V. Glasgow, J. Ryan, J. Pelo, P. Hussey, R. J. Nieto, C. H. Tyler, W. Huff, T. A. Sealt, W. Bastock, W. Nolan, H. S. Malone, J. I. Alvarez, A. J. Shaw, M. Ortlip, J. Breslin, G. O'Dell, E. E. Miles with having commit-ed a misdemeanor in that they did willfully
46 and unlawfully erect and cause to be erected, maintained and cause to be maintained, certain works, establishment and manufactory for the manufacture of gas, and a certain water tank, reservoir and receptacle for the storage of gas within the corporate limits of the city of Los Angeles, outside of the limits of that district as described in the purported ordinance attempted to be passed by the city council of the city of Los Angeles on the 3rd day of March 1902, as hereinbefore set forth, and that thereupon, upon the complaint filed in said proceeding in the said police court of the city of Los Angeles on the 6th day of March, 1902, that said city of Los Angeles did cause the arrest and detention of the said Thaddeus Lowe, F. A. Smith, M. Daly, R. Colahan, A. Burgess, W. B. Verner, F. Mullen, E. V. Glasgow, J. Ryan, J. Pelo, P. Hussey, R. J. Nieto; C. H. Tyler, W. Huff, T. S. Sealt, W. Bastock, W. Nolan, H. S. Malone, J. I. Alvarez, A. J. Shaw, M. Ortlip, J. Breslin, G. O'Dell, E. E. Miles upon the warrant issued by the judge of said police court of the city of Los Angeles for the alleged violation of the said city ordinance.

And your orator further shows unto your honors that by the arrest and detention of the said employees of your orator hereinbefore set forth, your orator has been compelled to desist and refrain from further work upon its said contract of erecting said water tank and gas-holder hereinbefore set forth, and said arrest of the said men

and employees was in violation of the rights of your orator as in said original bill of complaint set forth.

DAVIS & FARNUM MANUFACTURING COMPANY,
By ORLANDO MAINES, *Its Agent.*

LYNN HELM,
LEE, SCOTT, BAILEY & CHASE,
Solicitors for said Complainant.

47 UNITED STATES OF AMERICA. } ss:
Southern District, Southern Division, }

Orlando Maines being duly sworn deposes and says: That he is the agent of The Davis & Farnum Manufacturing Company, the complainant in the foregoing action; that he has read the amendment to the bill of complaint filed herein and that he knows the contents thereof and that the same is true of his own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters that he believes it to be true.

ORLANDO MAINES.

Subscribed and sworn to before me this 8th day of March, A. D. 1902.

[SEAL.] NATHAN NEWBY,
Notary Public in and for the County of Los Angeles, State of California, in said District.

(Endorsed:) No. 1015. In the circuit court of the United States ninth circuit, southern district of California southern division. Davis & Farnum Manufacturing Company plaintiff *vs.* The City of Los Angeles, a municipal corporation, defendant. Amendment and supplemental bill. Service of the within am'd bill admitted this 8th day of March, 1902. W. B. Mathews, per H. S. attorney for def't. Filed Mar. 10 1902 Wm. M. Van Dyke, clerk Lynn Helm Lee, Scott, Bailey & Chase, attorney-for complainant Los Angeles, California.

48 In the Circuit Court of the United States in and for the Southern District of California, Southern Division.

DAVIS & FARNUM MANUFACTURING COMPANY, a Corporation, Plaintiff,
vs.
THE CITY OF LOS ANGELES, a Municipal Corporation, Defendant. } In Equity.

The demurrer of the above-named defendant, The City of Los Angeles, a municipal corporation, to the bill of complaint of the above-named plaintiff.

This defendant, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint con-

tained to be true in such manner and form as the same are therein set forth and alleged, doth demur to the said bill. And for causes of demurrer showeth,

I.

It appeareth by the plaintiff's own showing by the said bill, that it is not entitled to the relief prayed by the bill against this defendant.

II.

It appeareth by the plaintiff's own showing by the said bill that it is not entitled to any relief herein against this defendant.

III.

It appeareth by the said bill that this honorable court has no jurisdiction of the person of this defendant.

49 IV.

It appeareth by said bill that this honorable court has no jurisdiction of the subject of this suit.

Wherefore, and for divers other good causes of demurrer appearing on the said bill, this defendant doth demur thereto. And he prays the judgment of this honorable court, whether he shall be compelled to make any answer to the said bill; and he humbly prays to be hence dismissed with his reasonable costs in this behalf sustained.

W. B. MATHEWS,
Solicitor for Defendant.

CITY HALL, LOS ANGELES.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

W. B. MATHEWS,
Solicitor for Defendant.

Los Angeles, Cal., March 10th, 1902.

STATE OF CALIFORNIA,
County of Los Angeles, Southern District of California, } ss:

M. P. Snyder, being duly sworn, deposes and says: I am an officer, to wit, the mayor of The City of Los Angeles, defendant in the above-entitled suit, and make this affidavit on behalf of said defendant. The foregoing demurrer is not interposed for delay.

M. P. SNYDER.

Sworn to before me this 10th day of March, 1902.

HERBERT J. GOUDGE,
[SEAL.] *Notary Public in and for the County of Los Angeles, State of California.*

50 (Endorsed:) (Original) No. 1015. In the circuit court of the United States, for the southern district of California.

Davis & Farnum Manufacturing Company, a corporation, plaintiff *vs.* The City of Los Angeles, a municipal corporation, defendant. Received copy of the within this 18 day of March, 1902, Lynn Helm, Lee, Scott, Bailey & Chase, attorney- for pl'ff. Filed Mar. 18, 1902, Wm. M. Van Dyke, clerk Chas. N. Williams, deputy W. B. Mathews, city attorney, city hall, Los Angeles, Cal., attorney for defendant.

51 At a stated term, to wit, the January term, A. D., 1902, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the southern district of California, southern division, held at the court-room in the city of Los Angeles on Thursday the third day of April, in the year of our Lord one thousand nine hundred and two:

Present: The Honorable Olin Wellborn, district judge.

DAVIS & FARNUM MANUFACTURING COMPANY, a Corporation, Complainant,
vs.
THE CITY OF LOS ANGELES, a Municipal Corporation, Defendant. } No. 1015.

This cause having heretofore been submitted to the court for its consideration and decision on complainant's application for a preliminary injunction, and the court having duly considered the same and being fully advised in the premises, it is now on this 3rd day of April, 1902, being a day in the January term, A. D., 1902, of said circuit court, ordered that complainant's application for a temporary injunction, be, and the same hereby is refused; and thereupon come Lynn Helm, Esq., and Edward C. Bailey, Esq., of counsel for complainant, and W. B. Mathews, Esq., Le Comte Davis, Esq., and W. R. Bacon, Esq., of counsel for defendant and now submit to the court for its consideration and decision defendant's demurrer to the bill of complaint, whereupon it is now by the court ordered that said demurrer be and the same hereby is sustained and complainant's bill of complaint dismissed.

52 I, Wm. M. Van Dyke, clerk of the circuit court of the United States, for the southern district of California, do hereby certify the foregoing to be a full, true and correct copy of an original order made and entered by said court April 3rd, 1902, in the cause entitled Davis & Farnum Manufacturing Company, a corporation, complainant, *vs.* The City of Los Angeles, a municipal corporation, defendant, No. 1015, and remaining of record therein.

Attest my hand and the seal of said circuit court, this 3rd day of April, A. D., 1902.

[SEAL.] WM. M. VAN DYKE, *Clerk.*

(Endorsed:) No. 1015. U. S. circuit court, ninth circuit, southern district of California. Davis & Farnum Manufacturing Company, a corporation, *vs.* The City of Los Angeles, a municipal corporation. Certified copy order sustaining demurrer and dismissing bill. Filed Apr. 3 1902 Wm. M. Van Dyke, clerk.

53 In the Circuit Court of the United States, Ninth Judicial Circuit, Southern District of California, Southern Division.

DAVIS & FARNUM MANUFACTURING COMPANY, a Corporation, Complainant,
vs.
THE CITY OF LOS ANGELES, a Municipal Corporation, Defendant. } No. 1015.

The complainant filed its bill of complaint herein on the 6th day of March, 1902, which is hereto annexed.

A subpœna to appear and answer in said cause was thereafter on the 7th day of March, 1902, issued, returnable on the 7th day of April, 1902, which is hereto annexed.

The complainant filed its amendment and supplemental bill of complaint herein on the 10th day of March, 1902, which is hereto annexed.

On the 18th day of March, 1902, the defendant filed herein its demurrer to the bill of complaint, which is hereto annexed.

On the 3rd day of April, 1902, the court made and entered herein an order refusing complainant's application for a temporary injunction, sustaining defendant's demurrer to the bill of complaint and dismissing complainant's bill of complaint, a copy of which order is hereto annexed.

On the 3rd day of April, 1902, a final decree in accordance with said order was signed, filed, entered and recorded herein and is hereto annexed.

54 UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Judicial Circuit, Southern District of California, Southern Division.

DAVIS & FARNUM MANUFACTURING COMPANY, a Corporation, Complainant,
vs.
THE CITY OF LOS ANGELES, a Municipal Corporation, Defendant. } No. 1015.

In the above-entitled, cause the court having on this 3rd day of April, 1902, being a day in the January term, A. D., 1902, of said circuit court of the United States for the southern district of California, ordered that said demurrer be sustained and that complainant's bill of complaint be dismissed,

Now therefore, it is ordered, adjudged and decreed that complainant's said bill of complaint be and the same hereby is dismissed, and that defendant have and recover of and from complainant its costs in this behalf, taxed at $—.

OLIN WELLBORN, *Judge.*

Decree entered and recorded April 3rd, 1902.

WM. M. VAN DYKE, *Clerk.*

55 (Endorsed:) No. 1015. U. S. circuit court, ninth circuit, southern district of California. Davis & Farnum Manufacturing Company, a corporation, *vs.* The City of Los Angeles, a municipal corporation. Decree. Filed Apr. 3 1902 Wm. M. Van Dyke, clerk.

56 Whereupon, said bill of complaint, subpœna, amendment and supplemental bill of complaint, demurrer to the bill of complaint, copy of order refusing application for temporary injunction, sustaining demurrer and dismissing bill and said final decree are hereto annexed, said final decree being duly signed, filed and enrolled pursuant to the practice of said circuit court.

Attest, etc.,

[SEAL.] WM. M. VAN DYKE, *Clerk.*

(Endorsed:) No. 1015. In the circuit court of the United States, ninth judicial circuit, for the southern district of California. Davis & Farnum Manufacturing Company, a corporation, *vs.* The City of Los Angeles, a municipal corporation. Enrolled papers. Filed April 3rd, 1902. Wm. M. Van Dyke, clerk. Recorded Decree Register Book No. 2, page 580.

57 In the Circuit Court of the United States in and for the Southern District of California, Southern Division.

DAVIS & FARNUM MANUFACTURING COMPANY, a Corporation, Plaintiff,

vs.

THE CITY OF LOS ANGELES, a Municipal Corporation, Defendant.

This cause coming on to be heard upon the motion of the plaintiff herein for a temporary injunction as prayed for in said bill of complaint, and the court having read the said complaint and heard the argument of counsel for plaintiff,

It is ordered that the said defendant show cause on Monday, the 10th day of March, 1902, at opening of the said circuit court at 10.30 o'clock a. m. why a preliminary injunction should not be granted herein enjoining the said defendant, The City of Los Angeles, its counsellors, attorneys, solicitors, officers, agents and employees, and all persons combining and confederating with it, and each and every of them from enforcing the said alleged ordinance number 6779, new series, attempted to be adopted the 25th day of November, 1901, and entitled "An ordinance amending an ordinance No. 6663, new series, entitled 'An ordinance prohibiting the erection or maintenance of gas works, gas tanks or reservoirs within certain portions of the city of Los Angeles,' approved August 26th, 1901, by amending section one of said ordinance;" or enforcing the said alleged ordinance number 7029, new series, entitled "An ordinance amending ordinance No. 6663, new series,

entitled 'An ordinance prohibiting the erection or maintenance
58 of gas works, gas tanks or reservoirs within certain portions of the city of Los Angeles,' approved August 26th, 1901, by amending section one of said ordinance," against the plaintiff or any of its agents, servants or employees, and from preventing the plaintiff from carrying out and prosecuting the said work of erecting the said wanter tank and gas-holder upon the terms in said bill of complaint described, situated in the city of Los Angeles, and State of California, to wit: All of lots sixteen, seventeen and eighteen of block two, Pomeroy & Mills' subdivision of the Hollenbeck tract, as per map recorded in Book 5, page 199 miscellaneous records of said Los Angeles county, in pursuance of its contract with the said Valley Gas & Fuel Company, as hereinbefore set forth, and from any manner interferring, retarding, interrupting, or stopping the work of said plaintiff, or its agents, servants or employees in carrying out said contract or in completing said work. As prayed for in said bill of complaint on file herein.

OLIN WELLBORN, *Judge.*

(Endorsed:) No. 1015. In the circuit court of the United States ninth circuit southern district of California southern division. Davis & Farnum Manufacturing Company plaintiff *vs.* The City of Los Angeles, defendant. Order to show cause. Filed Mar. 7 1902 Wm. M. Van Dyke, clerk Lynn Helm & Lee, Bailey & Chase, attorney- for plaintiff. Los Angeles, California.

59 OFFICE OF THE U. S. MARSHAL,
SOUTHERN DISTRICT OF CALIFORNIA.

I hereby certify that I received the within writ on the 7th day of March 1902 and personally served the same on the 7th day of March, 1902, on The City of Los Angeles the defendant therein, named, by delivering to and leaving with M. P. Snyder, mayor of the city of Los Angeles, personally, at the county of Los Angeles in the said district, a certified copy thereof.

H. Z. OSBORNE,
U. S. Marshal,
By G. F. McCULLOCH, *Deputy.*

Los Angeles, Cal. March 7th, 1902.

60 In the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

DAVIS & FARNUM MANUFACTURING CO., a Corporation, Complainant,
v.
THE CITY OF LOS ANGELES, a Municipal Corporation, Defendant.
} No. 1015.

Opinion of the Court on Application for Temporary Injunction.

Complainant, at the commencement of this suit, was erecting, within the city of Los Angeles, for and under contract with another party, a water-holder and gas tank, and filed its bill solely to enjoin threatened criminal prosecutions, under an ordinance of said city, alleged to be invalid, against its employees for working on said structures, the purpose and effect of which prosecutions, the bill alleges, are to compel complainant to abandon said work, and thereby destroy or impair its vested property rights.

The questions now presented for consideration relate to the equitable jurisdiction of this court, and the validity of said ordinance. These questions will be taken up in the order of their statement, because if the jurisdiction does not exist, further inquiry concerning the ordinance is unnecessary.

The Supreme Court of the United States has said:

"The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of prop-
61 erty. It has no jurisdiction over the prosecution, the punishment, or the pardon of crimes and misdemeanors, or over the appointment or removal of public officers. To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offences, or for the removal of public officers, is to invade the domain of the courts of common law, or of the executive and administrative department of the Government. * * *

"The modern decisions in England, by eminent equity judges, concur in holding that a court of chancery has no power to restrain criminal proceedings, unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there. Att'y Gen. *v.* Cleaver, 18 Ves. Jr. 211, 220; Turner *v.* Turner, 15 Jur. 218; Saull *v.* Browne, L. R. 10 Ch. 64; Kerr *v.* Preston, L. R. Ch. D. 463.

"Mr. Justice Story, in his Commentaries on Equity Jurisprudence, affirms the same doctrine. Story Eq. Jur. § 893. And in the American courts, so far as we are informed, it has been strictly and uniformly upheld, and has been applied alike whether the prosecutions or arrests sought to be restrained arose under statutes of the State, or under municipal ordinances. West *v.* Mayor of N. Y. 10 Paige 539; Davis *v.* Am. Society, etc., 74 N. Y. 362; Tyler *v.* Hamersley, 44 Conn. 419, 422; Stuart *v.* La Salle Co. 83 Ill. 341; Devron *v.* First

Municipality, 4 La. Ann. 11; Levy *v.* Shreveport, 26 La. Ann. 620; Moses *v.* Mobile, 52 Ala. 198; Gault *v.* Wallis, 53 Ga. 675; Phillips *v.* Stone Mountain, 61 Ga. 386; Cohen *v.* Goldsboro Com'rs, 77 N. C. 2; Waters Pierce Oil Co. *v.* Little Rock, 39 Ark. 412; Spink *v.* Francis, 19 Fed. Rep. 670, and 20 Fed. Rep. 567; Suess *v.* Noble, 31 Fed. Rep. 855." (*Ex parte* Sawyer, 124 U. S. 200, XXXI Lawyers' Ed. 406.)

To the same effect are the following cases: Suess *v.* Noble, *et al.*, 31 Fed. Rep. 855; Hemsley, *et al.*, *v.* Myers, *et al.*, and nine other cases, including M. Schandler Bottling Co. *v.* Welch, county attorney, etc., *et al.*, 45 Fed. Rep. 283; Minneapolis Brewing Co. *v.*
62 M'Gillivray, 104 Fed. Rep. 272; Crighto *v.* Dahmer, 21 L. R. A. 84; City of Denver *v.* Beede, 54 Pac. Rep. 624; Wardens of St. Peter's Episcopal Church *v.* Town of Washington, 13 S. E. Rep. 700; and City of Moultrie *v.* Patterson, 34 S. E. Rep. 600.

The clear and positive declaration of law by the highest judicial tribunal of the land in *Ex parte* Sawyer, *supra*, is, without the other citations, determinative of the case at bar, since the prosecutions here sought to be enjoined are outside the exceptions to, and fully within the general rule enunciated in the Sawyer case.

Complainant, however, contends, that said rule is further restricted to the extent indicated by the following excerpts:

"Writers on equity jurisdiction properly say that the court of chancery does not deal with matters of crime, misdemeanors, offenses against prohibitory laws, nor questions of mere morality. But there is this reservation, that it is only when those matters are not connected with rights of property with respect to which the court has jurisdiction. Circumstances may confer a jurisdiction. Attorney General *v.* Cleaver, 18 Ves. 211; Macaulay *v.* Shackell, 1 Bligh. (N. S.) 96. In Springhead Spinning Co. *v.* Riley, (L. R.) 6 Eq. 558, the vice-chancellor says: 'The jurisdiction of this court is to protect property, and it will interfere by injunction to stay any proceedings, whether connected with crime or not, which go to the immediate or tend to the ultimate destruction of property, or to make it less valuable for use or occupation.'" (Louisiana State Lottery Co., *et al.*, *v.* Fitzpatrick, *et al.*, 15 Fed. Cas. 984.)

"Counsel urge that this bill does not show a cause of action cognizable in chancery against Mr. Wiltsie, the district attorney, since its purpose is to restrain him from instituting prosecutions under color of the amendment of 1897. But this complainant is seeking to protect a property right, and it seems to be law that, when such
63 prosecutions are threatened under color of an invalid statute for the purpose of compelling the relinquishment of a property right, the remedy in chancery is available." (Central Trust Co. *v.* Citizens' St. R. R. Co., 80 Fed. Rep. 225.)

"'If the charge be of a criminal nature, or offence against the public, and does not touch the enjoyment of property, then a court of equity should not interpose by injunction.' On the other hand, where it is manifest, as in this case, that a prosecution and arrest is threatened for an alleged violation of city ordinances for the sole purpose of preventing the exercise of civil rights conferred directly

by law, injunction is a proper remedy to prevent injury to the party thus menaced." * * * (City of Atlanta *v.* Gate City G. L. Co., 71 Ga. Rep. 126.)

Besides the three cases last named, complainant also cites, in support of its contention, the following: Reagan *v.* Farmers' L. & T. Co., 154 U. S. 388; Los Angeles City Water Co., *v.* City of Los Angeles, 103 Fed. Rep. 711; M. Schandler Bottling Co. *v.* Welch, 42 Fed. Rep. 561; Rushville *v.* Rushville Natural Gas Co., 15 L. R. A. 321; Springhead Spinning Co. *v.* Riley, 6 L. R. Eq. 588; City of Austin *v.* Cemetery Association, 28 S. W. Rep. 528; Mayor, etc., of Baltimore *v.* Radecke, 49 Md. Rep. 217; Port of Mobile *v.* Louisville & N. R. R. Co., 4 Southern Rep. 106; Wood *v.* City of Brooklyn, 14 Barb. Rep. 425; and Manhattan Iron Works *v.* French, 12 Abbott's New Cases 466.

While it is not my purpose to examine in detail all of complainant's citations, brief references will be made to a few of them.

The opinion in the Louisiana Lottery case, *supra*, as shown by the above quotation therefrom, rests largely upon a principle of equity, well recognized, but which, it seems to me, was inapplicable.

The same is true of City of Atlanta *v.* Gate City G. L. Co., 64 *supra*, where the opinion quotes, from Kerr on Injunctions, the principle to which I refer, as follows:

"'A court of equity,' says Kerr (Injunctions 2), 'has no jurisdiction in matters merely criminal or merely immoral, which do not affect any right of property. If a charge be of a criminal nature, or of an offence against the public peace, and does not touch the enjoyment of property, jurisdiction cannot be entertained. * * * But if an act which is also criminal touches also the enjoyment of property, the court has jurisdiction, but its interference is founded solely on the ground of injury to property.'" (71 Ga. Rep. 126.)

In City of Austin *v.* Austin City Cemetery Association, *supra*, the court discerns and states the inapplicability of the principle as follows:

"Yet it has been held that 'the court will interfere to prevent acts amounting to crime, if they do not stop at crime, but also go to the destruction or deterioration of the value of property.' Spinning Co. *v.* Riley, L. R. 6 Eq. 551. This, however, does not assist us materially in the solution of the present question. It would seem clear that if a party could be enjoined from doing an act, not criminal in its nature, which is injurious to the property of another, he could also be enjoined if the act be one made punishable by law as a crime. The punishment of the criminal, when the act committed has injuriously affected the value of the property of another, does not repair the injury. The question under consideration arises upon quite a different case." (28 S. W. Rep. 529.)

The principle of equity above stated, whose misapplication has led to erroneous conclusions, as I conceive, in some of the cases cited by complainant, means simply, that the fact, that a threatened act, if done, would be a crime, will not prevent a court of equity from enjoining the commission of the act, where it would also be an invasion

of complainant's property rights, and the other requisites to equitable relief concur.

65 The case most frequently cited for this principle is Springhead Spinning Co. *v.* Riley, 6 L. R. Eq. 551, where, at page 558, the court, without reference to its facts, says: "The jurisdiction of this court is to protect property, and it will interfere by injunction to stay any proceedings, whether connected with crime or not, which go to the immediate, or tend to the ultimate destruction of property, or to make it less valuable for use or occupation."

This quotation, although so often otherwise assumed, has no reference whatever to criminal prosecutions, or even to civil suits, but the word "proceedings," therein employed, has an entirely different application, as clearly appears from the facts stated in the syllabus of the case, which is as follows:

"The defendants, who were officers of a trades union, gave notice to workmen by means of placards and advertisements, that they were not to hire themselves to the plaintiffs pending a dispute between the union and the plaintiffs. The bill prayed an injunction to restrain the issuing of the placards and advertisements, alleging that by means thereof the defendants had, in fact, intimidated and prevented workmen from hiring themselves to the plaintiffs, and that the plaintiffs were thereby prevented from continuing their business, and the value of their property was seriously injured and materially diminished:—

"Held, upon demurrer, that the acts of the defendants, as alleged by the bill, amounted to crime, and that the court would interfere by injunction to restrain such acts, inasmuch as they also tended to the destruction or deterioration of property." (6 L. R. Eq. 551.)

As a further abstract statement of the law concretely enunciated in said syllabus, substantially, however, to the same effect as the one above quoted, the court, at page 560, says: "The truth, I

66 apprehend, is, that the court will interfere to prevent acts amounting to a crime, if they do not stop at crime, but also go to the destruction or deterioration of the value of property."

This rule has no connection with, or relation whatever to the question of the power of a court of equity to enjoin criminal prosecutions, and I am unable to accept as well reasoned any conclusion, which results from confounding the two matters.

In Reagan *v.* Farmers' L. & T. Co. neither the opinion of the court nor briefs of counsel discuss or in any way refer to the question last mentioned, and this, doubtless, for the reason, that the proceedings there enjoined were not criminal prosecutions, but civil actions to recover statutory forfeitures and penalties, and, moreover, in that case, there were other grounds for equitable relief.

In Los Angeles City Water Co. *v.* City of Los Angeles, of the numerous authorities, which the opinion cites, concerning the remedy by injunction, not one touches the question of equitable cognizance over criminal prosecutions, and the inference is a fair one, that it was not presented in argument, or specially considered by the court. Furthermore, there was jurisdiction in the case to enjoin civil suits for the forfeiture of complainant's property,

and it was no doubt assumed by all the parties, whether correctly or otherwise need not now be considered, that the court, having acquired jurisdiction for one, would exercise it for all purposes.

In M. Schandler Bottling Co. *v.* Welch, 42 Fed. Rep. 561, on which complainant seems to place much reliance, the opinion by Philips, district judge, was filed July the 18th, 1890, on the granting of a temporary injunction. Afterwards, to wit, February the 18th, 1891, the same case was heard on demurrer before Caldwell, circuit judge, when the demurrer was sustained, the temporary injunction was dissolved, and the bill dismissed for want of equity. (45 Fed. Rep. 283.)

67 On the first hearing, the court said:

"The remaining question, not disposed of in that discussion, is whether or not this suit is obnoxious to the objection that a court of equity never extends its jurisdiction to the enjoining of criminal proceedings. This is, unquestionably, a well-settled rule of equity jurisprudence. Railway Co. *v.* Kansas City, 29 Mo. App. 89, and loc. cit. This question underwent extended discussion in *re* Sawyer, 124 U. S. 200, 8 Sup. Ct. 482. Mr. Justice Gray, who delivered the majority opinion, said, *inter alia:*

"'The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property. It has no jurisdiction over the prosecution, the punishment, or the pardon of crimes or misdemeanors. * * * To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses, * * * is to invade the domain of the courts of common law.'

"Without stopping to consider whether this general rule is limited to criminal proceedings already begun in the court of criminal jurisdiction, it is sufficient to the matter in hand to say, as indicated in the quotation above made, that the rule has its exceptions. One of these is where a threatened criminal proceeding is hostile, vexatious, and unwarranted, and involves the wanton destruction of or injury to property interests of the accused; and especially so under circumstances where, if permitted to proceed, the party injured would have no adequate remedy at law for restitution. Mr. Justice Gray recognizes this. He quotes from Sheridan *v.* Colvin, 78 Ill. 237:

"'It is elementary law that the subject-matter of the jurisdiction of a court of chancery is civil property. The court is conversant only with questions of property and the maintenance of civil rights. Injury to property, whether actual or prospective, is the
68 foundation on which the jurisdiction rests. The court has no jurisdiction in matters purely criminal or merely immoral, which do not affect any right to property.'

"Again he says:

"'No question of property is suggested in the allegations of matters of fact in the bill, or would be involved in any decree that the court could make thereon.'" (42 Fed. Rep. 563.)

On the latter hearing, the court said: "The bill seeks to enjoin criminal proceedings. A court of equity possesses no such power.

This principle is settled by the uniform current of authorities in England for two centuries, and in this country from the foundation of its jurisprudence. The recent emphatic reaffirmance of the doctrine by the Supreme Court of the United States renders it unnecessary to do more than repeat the rule in the language of the court." Then follows the quotation which I have already given from *Ex parte* Sawyer, *supra*.

Thus, it will be seen, that the latter decision, although not so in terms, is substantially a reversal of the former one. It will also be noted, that the opinion on the first hearing, when the temporary injunction was granted, seeks to draw support from *Ex parte* Sawyer, by quoting certain expressions of Mr. Justice Gray with reference to property rights and civil rights.

Obviously, however, these expressions were used by Mr. Justice Gray, not to suggest a further exception, but merely to show, that the facts of the case did not bring it within the exception embodied in his previous statement of the general doctrine, which I have already quoted, namely (the italics being mine): "The modern decisions in England by eminent equity judges concur in holding that a court of chancery has no power to restrain criminal proceedings, *unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there.*"

69 This unambiguous and definite statement of the rule does not admit of any exception other than the one, which it expressly allows: besides, a careful examination of at least one of the authorities cited, Suess *v.* Noble, 31 Fed. Rep. 855, shows, that no other exception could have been in the mind of the court. The following is the statement of the last case:

"The original cause of State *v.* Suess was removed from the district court of Jefferson county, Iowa, to this court upon the petition of said Suess, and the same is now pending here. The transfer was made in pursuance of the decision of the circuit judge, Brewer, in the case of State *v.* Walruff, 26 Fed. Rep. 178. The purpose of that proceeding was to have the brewery owned and maintained by said Suess declared a nuisance, and as such perpetually enjoined and abated. A temporary restraining order, which is still in full force, was issued from this court, the purpose of which was to restrain certain persons, who were carrying on the civil proceedings in the State court, from prosecuting the same to the injury and virtual destruction of the property pending the determination of the question of the jurisdiction of this court over the subject-matter of the said original suit. Lewis Suess now presents his petition to this court against the above-named defendants and others, alleging that they are engaged in commencing and carrying on many criminal prosecutions against him before certain justices of the peace 'for each separate sale of beer at his brewery,' and that they propose 'to place him on trial and find him guilty of selling intoxicating liquors, and to impose upon him heavy fines for said alleged offenses,' etc. He also states, in a supplemental petition, that he was indicted at the January term of the district court of said county for the alleged crime of causing a nuisance by the sale of beer at his brewery; that he was convicted of

said alleged offense, and that he has taken an appeal to the supreme court of Iowa upon the Federal question as to the constitutionality of the prohibitory law, etc. The prayer of his petition is that
70 this court issue an injunction restraining said defendants from the prosecution of said criminal suits in violation of his rights respecting the subject-matter of the action now pending in this court until the final determination of the same."

Thus, it will be seen, that the criminal prosecutions sought to be enjoined were one of the means employed to close up the complainant's business, and yet the court held, quoting the syliabus: "No power exists in any court of equity to interfere by injunction with the prosecution and punishment of crimes and offenses in the courts of common law."

In the quotation which Mr. Justice Gray makes from the Illinois case of Sheridan *v.* Colvin, the phrase, "The court has no jurisdiction in matters purely criminal or merely immoral which do not affect any right to property," has no reference to criminal prosecutions, but was simply intended to declare, that a court of equity would not interfere with acts merely on the ground of their immorality, or because they would, if committed, be crimes.

So that the decision in *Ex parte* Sawyer, *supra*, whether we look solely to its text, or the supporting authorities, is, as I have before stated, conclusive against complainant's contention.

In addition to what has already been said, it may be appropriately observed, that regulations of saloons, beer halls, of theaters and places of amusement generally, of market places, of slaughter-houses, of gas works,—indeed, of all establishments and trades subject to the police power of the State, of streets and franchises therein for railway tracks, telegraph poles, pipe lines, etc., unavoidably affect property rights, and are usually rendered effective by making their violations punishable offenses. Now, if there were such jurisdiction as that, for which complainant contends, every controversy over the validity of an ordinance or statute relating to any of the matters enumerated would furnish an occasion for interference by
71 injunction, and thus would be presented the remarkable situation of courts of equity, State and Federal, exercising supervisory power over the administration of a part, not inconsiderable, of the criminal laws of the country.

The jurisdiction asserted by complainant does not, in my opinion, exist, and, for that reason, the temporary injunction applied for will be refused.

OLIN WELLBORN, *Judge.*

(Endorsed:) No. 1015. U. S. circuit court, southern district of California. Davis & Farnum Manfg. Co. *vs.* City of Los Angeles. Opinion of the court on application for temporary injunction. Filed Apr. 3 1902 Wm. M. Van Dyke, clerk Chas. N. Williams, deputy

72 At a stated term, to wit, the January term, A. D., 1902, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the southern district of Califor-

nia, southern division, held at the court-room in the city of Los Angeles, on Thursday, the tenth day of April, in the year of our Lord one thousand nine hundred and two.

Present: The Honorable Olin Wellborn, district judge.

DAVIS & FARNUM MANUFACTURING Co., a Corporation, Complainant,
v.
THE CITY OF LOS ANGELES, a Municipal Corporation, Defendant. } No. 1015.

It is ordered, that the clause of the opinion filed herein April the 3rd, 1902, beginning with the words "In addition to," on page 11, and ending with the words "punishable offenses," on page 12, be stricken out, and the following substituted therefor:

In addition to what has already been said, it may be appropriately observed, that municipal and State regulations of saloons, beer halls, theaters and places of amusement generally, market places, slaughter-houses, gas works, powder magazines, laundries, cemeteries, fire limits, streets, particularly obstructions, railway tracks, telegraph poles, pipe lines, etc., therein—indeed, of all establishments, trades and occupations subject to the police power of the State, unavoidably affect property rights and are usually rendered effective by making their violations punishable offenses.

And the clerk of this court is directed to attach a copy of this order to the margin and near the bottom of page 11 of said opinion.

73 In the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

DAVIS & FARNUM MANUFACTURING COMPANY, a Corporation, Complainant,
vs.
CITY OF LOS ANGELES, Defendant.

Comes now the said complainant and files the following assignment of errors upon which it will rely on appeal in the above-entitled cause:

1. The court erred in denying complainant's motion for an injunction in the above-entitled cause;

2. The court erred in sustaining the demurrer filed to the complaint in the above-entitled cause;

3. The court erred in dismissing the complainant's bill;

4. The court erred in entering the decree in favor of the said City of Los Angeles, defendant, and for its costs against the said complainant.

In order that the foregoing assignment of errors may be and appear of record, complainant presents the same to the court, and prays that such disposition may be made thereof as in accordance with law and the statutes of the United States in such case made

and provided; and complainant prays a reversal of the decretal order and drecree of dismissal made and entered by said court.

LYNN HELM,
LEE, SCOTT, BAILEY & CHASE,
Solicitors for Complainant.

74 (Endorsed:) No. 1015. In the circuit court of the United States ninth circuit southern district of California. Davis & Farnum Manufacturing Company plaintiff *vs.* City of Los Angeles defendant. Assignment of errors. Filed Sep. 29 1902. Wm. M. Van Dyke, clerk. Lynn Helm, attorney for complainant. Los Angeles, California.

75 In the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

DAVIS & FARNUM MANUFACTURING COMPANY, a Corporation, Complainant,
vs.
CITY OF LOS ANGELES, Defendant.

To the Honorable Olin Wellborn, district judge and one of the judges of the above-named court, presiding therein:

The above-named complainant in the above-entitled cause, Davis & Farnum Manufacturing Company, conceiving it is aggrieved by the order and decree made and entered by the above-named court in the above-entitled cause, under date of April 3rd, 1902, wherein and whereby it was ordered and decreed that the said complaint be dismissed for want of equity, and the injunction prayed for denied, does hereby appeal to the Supreme Court of the United States from said order and decree, and each and every part thereof, and it prays that its petition for its said appeal may be allowed, and that the transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated September 29th, 1902.

LYNN HELM,
LEE, SCOTT, BAILEY & CHASE,
Solicitors for Complainant.

76 (Endorsed:) No. 1015. In the circuit court of the United States ninth circuit southern district of California. Davis & Farnum Manufacturing Company plaintiff *vs.* City of Los Angeles defendant Petition for appeal. Filed Sep. 29 1902 Wm. M. Van Dyke clerk Lynn Helm, attorney for complainant. Los Angeles, California

77 At a stated term, to wit: August, A. D. 1902, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the southern district of California, held at the

court-room in the city and county of Los Angeles, on Monday, September 29th, A. D. 1902.

Present: Honorable Olin Wellborn, district judge, one of the judges of the circuit court of the United States for the ninth circuit, sitting in equity.

DAVIS & FARNUM MANUFACTURING COMPANY, a Corporation, Complainant,
vs.
CITY OF LOS ANGELES, Defendant.

On motion of Lynn Helm, Esq., solicitor and of counsel for complainant, it is ordered that an appeal to the Supreme Court of the United States, from the final decree heretofore filed and entered herein be, and the same is hereby allowed, and that a certified transcript of the record, complaint, demurrer, pleadings and all proceedings herein be forthwith transmitted to the said Supreme Court of the United States.

It is further ordered that a bond on appeal be fixed at the sum of five hundred dollars to act as a supersedeas bond; also as a bond for costs and damages on appeal.

Dated September 29th, 1902.

OLIN WELLBORN, *Judge.*

78 (Endorsed:) No. 1015. In the circuit court of the United States ninth circuit southern district of California Davis & Farnum Manufacturing Company plaintiff *vs.* City of Los Angeles defendant Order allowing appeal. Filed Sep. 29 1902 Wm. M. Van Dyke, clerk Lynn Helm, attorney for complainant. Los Angeles, California

79 In the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

DAVIS & FARNUM MANUFACTURING COMPANY, Complainant,
vs.
CITY OF LOS ANGELES, Defendant.

Know all men by these presents that we, The Davis & Farnum Manufacturing Company, a corporation organized and doing business under the laws of the State of Massachusetts, as principal, and American Bonding Company of Baltimore, organized under the laws of the State of Maryland, as surety, are held and firmly bound unto the City of Los Angeles, a municipal corporation of the State of California, in said district, in the full and just sum of five hundred dollars, to be paid to the said City of Los Angeles, to which payment well and truly to be made, we bind ourselves, jointly and severally and firmly by these presents.

Sealed with our seals and dated this 29th day of September, A. D. 1902, at Los Angeles, Cal.

Whereas, lately at a session of the circuit court of the United States, for the southern district of California, in a suit pending in said court between the said Davis & Farnum Manufacturing Company, a corporation, complainant, and The City of Los Angeles, a municipal corporation, defendant, a decree was rendered against the said complainant, Davis & Farnum Manufacturing Company, and the said Davis & Farnum Manufacturing Company have obtained from said court an order allowing an appeal to the Supreme
80 Court of the United States to reverse the decree of the aforesaid suit, and a citation directed to the said City of Los Angeles, is about to be issued, citing and admonishing it to be and appear at the Supreme Court of the United States, to be holden at Washington, District of Columbia.

Now, the condition of the above obligation is such, that if the said Davis & Farnum Manufacturing Company shall prosecute its said appeal to effect and shall answer all damages and costs that may be assessed against it if it fails to make good its plea, then the above *above* obligation is to be void; otherwise to remain in full force and virtue.

DAVIS & FARNUM MANUFACTURING COMPANY, [SEAL.]
By LYNN HELM, *Its Attorney.*
AMERICAN BONDING COMPANY OF BALTIMORE,
[SEAL.] By E. T. DUNNING, *Vice-President.*

Attest: WM. DIETERLE,
Assistant Secretary.

The foregoing bond is approved this 29th day of September, 1902.
OLIN WELLBORN, *Judge.*

(Endorsed:) No. 1015. In the circuit court of the United States, ninth circuit, southern district of California. Davis & Farnum Manufacturing Co. plaintiff *vs.* City of Los Angeles defendant. Appeal bond Filed Sep. 29, 1902 Wm. M. Van Dyke, clerk Lynn Helm, attorney for complainant, Los Angeles, California

81 In the Circuit Court of the United States of America of the Ninth Judicial Circuit in and for the Southern District of California, Southern Division.

DAVIS & FARNUM MANUFACTURING COMPANY, a Corporation, Complainant,
vs.
THE CITY OF LOS ANGELES, a Municipal Corporation, Defendant.
} No. 1015.

I, Wm. M. Van Dyke, clerk of the circuit court of the United States of America, of the ninth judicial circuit, in and for the southern district of California, do hereby certify the foregoing

eighty (80) typewritten pages, numbered from 1 to 80 inclusive, and comprised in one (1) volume, to be a full, true and correct copy of the record, pleadings, papers, opinion of the court, assignment of errors and all proceedings in the above and therein entitled cause, and that the same together constitute the transcript of the record on appeal to the Supreme Court of the United States, in said cause.

I do further certify that the cost of the foregoing record is $50.50 the amount whereof has been paid me by The Davis &
82 Farnum Manufacturing Company, a corporation, the appellant in said cause.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said circuit court of the United States of America, of the ninth judicial circuit, in and for the southern district of California, this 8th day of October, in the year of our Lord one thousand nine hundred and two, and of the Independence of the United States the one hundred and twenty-seventh.

Seal U. S. Circuit Court, Southern Dist. Cal., 1886.

WM. M. VAN DYKE,
Clerk of the Circuit Court of the United States of America of the Ninth Judicial Circuit in and for the Southern District of California.

Endorsed on cover: File No. 18,735. S. California C. C. U. S. Term No. 507. Davis & Farnum Manufacturing Company, appellant, vs. The City of Los Angeles. Filed November 14", 1902.

35302

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, A. D. 1902.

Davis & Farnum Manufacturing Company, a corporation,
Appellant,

vs.

City of Los Angeles, a municipal corporation,
Appellee.

BRIEF AND ARGUMENT ON BEHALF OF APPELLANT.

May it Please Your Honors:

There are two general questions to be decided in this case:

First—Whether the ordinance of the City of Los Angeles adopted on the 3rd day of March, 1902, amending the ordinance of August 26th, 1901, in reference to the erection or maintenance of gas works within certain portions of the City of Los Angeles is valid and binding upon the complainant, contractor of Caroline W. Dobbins, engaged in the business of erecting gas works upon the premises of the said

Caroline W. Dobbins as depriving it of the right to conduct a lawful business of erecting gas works and denying to it, with said Caroline W. Dobbins, the equal protection of the laws, with all other persons within the jurisdiction of said municipality, and as against vested rights which Caroline W. Dobbins and said complainant under her, had acquired in reference thereto by virtue of legislative authority, and as depriving said Caroline W. Dobbins and said complainant under her thereof without due process of law.

Second—Whether a court of equity has jurisdiction to restrain by injunction a municipality from instituting criminal proceedings, when such prosecutions are threatened or instituted under color of an invalid ordinance for the purpose of compelling the relinquishment of a property right.

We shall discuss these questions in the order of their statement for the reason that if the ordinance is invalid and interferes with the right of the complainant to conduct a lawful business, or with its vested rights or those of its employer, which she, or the complainant under her, has acquired by virtue of legislative authority, it will follow that a court of equity has jurisdiction to restrain by injunction the defendant municipality from instituting and prosecuting the criminal proceedings threatened or instituted under color of such invalid ordinances for the purpose of compelling the relinquishment of the property rights of the complainant or its employer. A crime or offense for which an offender can be prosecuted is not created by an invalid law or ordinance. Every arrest under such an ordinance is a lawless and forcible

trespass, and a court of equity will restrain a trespasser from coercing submission to lawless demands by prosecutions for alleged crimes before courts which have no jurisdiction to try the accusation.

STATEMENT OF THE CASE.

This was a bill in equity filed in the Circuit Court of the United States for the Southern District of California, Ninth Circuit, by the appellant, Davis & Farnum Manufacturing Company, a citizen of the state of Massachusetts against the appellee, the City of Los Angeles, a municipal corporation and a citizen of the state of California, for the purpose of obtaining an injunction to restrain the City of Los Angeles from enforcing a certain ordinance adopted by the City Council of the City of Los Angeles, March 3rd, 1902, amending an ordinance adopted August 26th, 1901, in reference to the erection or maintenance of gas works, gas tanks or reservoirs within certain limits of the City of Los Angeles, on the ground that such ordinance was in violation of the Federal Constitution because it deprived the complainant of the right to conduct a lawful business of erecting gas works and manufacturing gas and denying to it and its employer the equal protection of the laws, with all other persons within the jurisdiction of said municipality, and because the ordinance of March 3rd, 1902, impaired the vested rights which the said Caroline W. Dobbins and the complainant as a contractor under her had acquired under legislative authority from the City of Los Angeles, and because said amended ordinance deprived the said complainant as a contractor of said

Caroline W. Dobbins of its property without due process of law.

The Circuit Court denied the prayer of said complaint and refused to grant an injunction for the reason given in the opinion filed by the District Judge who held that a court of equity was without jurisdiction to enjoin criminal prosecutions under a statute or ordinance alleged to be unconstitutional and void, even though it was also alleged that it was the purpose of such prosecutions to injure complainant in its property rights and that such would be their effect.

This litigation arises out of the passage by the City of Los Angeles of certain ordinances attempting to prohibit the erection or maintenance of gas works, gas tanks or reservoirs within certain portions of said city and out of the different contentions of the parties as to the character and validity of those ordinances.

The complainant avers in its bill that on the 26th day of August, 1901, the City Council of the City of Los Angeles passed an ordinance, number 6663, as follows:

> An Ordinance prohibiting the erection or maintenance of gas-works, gas tanks or reservoirs within certain portions of the City of Los Angeles:
>
> The Mayor and Council of the City of Los Angeles do ordain as follows:
>
> SECTION 1. It shall be unlawful for any person firm or corporation to erect or cause to be erected, maintain or cause to be maintained, any works, establishment or manufactory for the manufacture of gas; or any tank, reservoir or other receptacle for the storage of gas within the

corporate limits of the City of Los Angeles, outside of the limits of the district described as follows, to wit:

Beginning at the intersection of the center line of the official bed of the Los Angeles river with the south charter boundary line of the City of Los Angeles; thence westerly along said south charter boundary line to the center line of Santa Fe avenue; thence northerly along the center line of Santa Fe avenue to the center line of Violet street; thence westerly along the center line of Violet street to the center line of Wilson street; thence northerly along the center line of Wilson street to the center line of Atlantic street; thence westerly along the center line of Atlantic street to the center line of Alameda street; thence northerly along the center line of Alameda street to the center line of Palmetto street; thence easterly along the center line of Palmetto street to the center line of Molino street; thence northerly along the center line of Molino street to the center line of Fourth street; thence easterly along the center line of Fourth street to the prolonged center line of Santa Fe avenue; thence northerly along said prolonged center line of Santa Fe avenue to the center line of First street; thence easterly along the center line of First street to the center line of Center street; thence northerly along the center line of Center street to the center line of Aliso street; thence westerly along the center line of Aliso street to the center line of Alameda street; thence northerly along the center line of Alameda street to the center line of San Fernando street; thence easterly along the center line of San Fernando street to the center line of the official bed of the Los Angeles river; thence southerly along the official bed of the Los Angeles river to the point of beginning.

Section 2. Any person, firm or corporation who shall violate any of the provisions of this Ordinance shall be deemed guilty of a misdemeanor and upon conviction thereof shall be

punished by a fine of not less than One Hundred Dollars ($100) nor more than Five Hundred Dollars ($500) or by imprisonment in the City Jail for not less than Thirty (30) days nor more than One Hundred (100) days, or by both such fine and imprisonment. Every day that such gas works, tank or reservoir is maintaned in violation of the provisions of this Ordinance, shall be deemed a separate offense within the meaning of this Ordinance.

Section 3. Ordinance No. 174 approved July 2nd, 1885, and all other ordinances or parts of ordinances in conflict herewith are hereby repealed.

Section 4. The City Clerk shall certify to the passage of this Ordinance and cause the same to be published once in The Los Angeles Daily Journal and thereupon and thereafter it shall take effect and be in force.

Specifically the ordinance provides that it is unlawful for any person, firm or corporation to erect or cause to be erected, maintain or cause to be maintained, any works, establishment or manufactory for the manufacture of gas or any tank, reservoir or other receptacle for the storage of gas within the corporate limits of the City of Los Angeles outside of the district described in the ordinance. That district as originally laid out, included the district bounded on the north by San Fernando street, on the east by the Los Angeles river, making an apex at the junction of San Fernando street and the Los Angeles river, and on the south by the boundary of the city limits. The western boundary was an irregular line, and as we claim, was laid out and described for the purpose of protecting the existing works of the Los Angeles Lighting Company, and was bounded and designated

without regard to any geographical or natural lines, but simply described for the purpose of running around and including the present gas works of the Los Angeles Lighting Company in the City of Los Angeles. The violation of this ordinance was made a misdemeanor, punishable by fine or imprisonment, or both, and every day that such gas works, tank or reservoir should be maintained in violation of the purposes of said ordinance, should be deemed a separate offense within the meaning thereof.

Complainant alleged that on or about the first day of September, 1901, one Caroline W. Dobbins, a citizen of the state of California, in said district, made and entered into a certain contract with the Valley Gas & Fuel Company, a corporation duly organized and doing business under and by virtue of the laws of the state of California for the purpose, among other things, of erecting gas works, to build, construct and erect for the said Caroline W. Dobbins on certain premises to be designated by her in the City of Los Angeles and on certain premises owned by her, as hereinafter described, certain gas works, including all things necessary for the manufacture, recovery and storage of gas; that in order to enable the said Valley Gas & Fuel Company to carry out the said contract with the said Caroline W. Dobbins, complainant on or about the 17th day of September, 1901, at Waltham in the state of Massachusetts, entered into a certain contract with the said Valley Gas & Fuel Company to erect on those certain premises in the City of Los Angeles to be designated by the said Caroline W. Dobbins, certain portions of certain gas

works for the manufacture, recovery and storage of gas, consisting more particularly of a certain water tank and gas holder, said water tank and gas holder to be laid upon the cement foundations prepared by the Valley Gas & Fuel Company, to be 62 feet in diameter by 20 feet, 9 inches in height, and with a capacity of about 467,700 gallons of water; said tank to be made of sheet steel and iron; to have steel bottoms thoroughly rivetted and made water tight having a textile strength of 62,000 pounds to the square foot. Inside of said water tank was to be erected a steel gas holder with a capacity of 100,000 cubic feet of gas, consisting of two lifts with proper curbs and cups, in a good and workmanlike manner at a cost of $13,685.

Complainant averred that immediately on the entering into of said contract it commenced at its manufactory in the city of Waltham, aforesaid, the construction of said water tank and gas holder and the building of the necessary machinery to be used in connection therewith, and prepared and foundered the necessary iron and steel to be used therein; that as soon as the same was completed at said foundry, the same was forwarded from the city of Waltham in said state of Massachusetts by railroad transportation to the city of Los Angeles and delivered upon the premises of the said Caroline W. Dobbins in the complaint particularly described, and by her designated for that purpose; that since the arrival of said iron and steel on said premises as aforesaid, complainant employed divers and sundry men and skilled mechanics at great expense to complainant, bringing said

men from different parts of the United States, from Trenton, New Jersey, from Philadelphia, Pa., from Toledo, Ohio, and from San Francisco, California, and from other places for the purpose of putting together and erecting the said water tank and gas holder with the steel so made and furnished by the complainant as aforesaid, and pursuant to the contract aforesaid; that complainant commenced the said water tank and gas holder and had so far completed the same that at the time of the filing of said complaint said water tank was erected 15 feet 9 inches in height, and if complainant was allowed to go on with said work without interruption and interference from the defendant, the said water tank would in the course of a week or ten days be fully completed by complainant according to its contract with the Valley Gas & Fuel Company. It was averred that complainant was ready and willing and able with said men and with said steel and iron to complete the erection of said gas holder and fulfill and carry out on its part the terms of said contract so entered into between complainant and the Valley Gas & Fuel Company.

Complainant further averred that after the passage of the ordinance of August 26th, 1901, hereinbefore set forth, within the territory of the City of Los Angeles within which, by said ordinance, it was lawful to erect or maintain gas works, gas tanks or reservoirs for the manufacture of gas, and on or about the 28th day of September, 1901, said Caroline W. Dobbins, for the purpose of erecting gas works, purchased a tract of land consisting of three lots and a half and known as lots sixteen, seventeen and eighteen, and

part of lot fifteen of block two Pomeroy & Mill's subdivision of the Hollenbeck Tract, described in the bill of complaint filed herein.

On the first day of November following, Mrs. Dobbins applied to the Board of Fire Commissioners of the City of Los Angeles for a permit to erect and maintain gas works on said premises under what is known as the "Building Ordinance of the City of Los Angeles," which required that the person desiring to erect gas works within the City of Los Angeles should first secure from the Board of Fire Commissioners a permit so to do. This ordinance gave the Fire Commissioners, upon a hearing of all parties interested, authority to grant or refuse such permit.

Upon the application of Mrs. Dobbins to the Board of Fire Commissioners for such a permit, notices were properly given of the hearing in accordance with the ordinance to all persons interested, and on the 8th day of November, 1901, a hearing was had before the Board of Fire Commissioners. The Board of Fire Commissioners gave an opportunity to all persons interested to be heard, and having taken the matter under advisement, afterwards, on the 22nd day of November, 1901, the application of the said Caroline W. Dobbins for permission to erect and maintain a gas works was granted.

Mrs. Dobbins, having fully complied with all the ordinances then in force in the City of Los Angeles in reference to the erection of gas works, both as to the place of their erection and as to the securing of a permit from the proper authorities therefor, commenced the construction of the gas works

upon the premises which she had purchased within the district in which it was lawful to erect gas works under the ordinance of August 26th, 1901, and by virtue of the permit granted by the Board of Fire Commissioners. Contracts were immediately let with certain persons for the erection of certain portions of said gas works and more particularly for the laying of the cement foundations for the said water tank and gas holder to be erected thereon by the said complainant. Pursuant to said contracts the foundations for said gas holder and water tank and also the foundations for other portions of said work were laid at a cost of upwards of $2500; said foundations were of great strength and very costly material and if the same should have to be destroyed or removed it would cause irreparable damage and injury to the said Caroline W. Dobbins, the Valley Gas & Fuel Company and to complainant, as under the contract between the complainant and the Valley Gas & Fuel Company to erect thereupon the water tank and gas holder aforesaid, complainant would not be able to complete said contract so entered into as in said complaint described.

After the material had all been placed upon the ground for the erection of these foundations, and the foundations were nearly completed, on the 25th day of November, 1901, the City Council of the City of Los Angeles attempted to pass a purported ordinance entitled "An ordinance amending ordinance number 6663, new series, entitled 'An ordinance prohibiting the erection or maintenance of gas works, gas tanks or reservoirs within certain portions of the city of

Los Angeles, approved August 26th, 1901, by amending Section one of said ordinance." Said purported ordinance is in words and figures as follows:

ORDINANCE NO. 6779.

(New Series.)

An Ordinance amending Ordinance No. 6663, New Series, entitled "An Ordinance prohibiting the erection or maintenance of gas works, gas tanks or reservoirs within certain portions of the City of Los Angeles," approved August 26, 1901, by amending Section 1 of said Ordinance.

The Mayor and Council of the City of Los Angeles do ordain as follows:

Section 1. That Section 1 of Ordinance No. 6663, New Series, entitled "An Ordinance prohibiting the erection or maintenance of gas works, gas tanks, or reservoirs within certain portions of the City of Los Angeles," approved August 26th, 1901, be and the same is hereby amended to read as follows:

Section 1. It shall be unlawful for any person, firm or corporation to erect or cause to be erected, maintain or cause to be maintained any works, establishment or manufactory for the manufacture of gas, or any tank, reservoir or other receptacle for the storage of gas within the corporate limits of the City of Los Angeles, outside of the limits of the district described as follows, to wit:

Beginning at the intersection of the center line of the official bed of the Los Angeles river with the south charter boundary line of the City of Los Angeles; thence westerly along said south charter boundary line to the center line of Santa Fe avenue; thence northerly along the center line of Santa Fe avenue to the center line of Violet street; thence westerly along the center line of Violet street to the center line of Wilson street;

thence northerly along the center line of Wilson street to the center line of Atlantic street; thence westerly along the center line of Atlantic street to the center line of Alameda street; thence northerly along the center line of Alameda street to the center line of Palmetto street; thence easterly along the center line of Palmetto street to the center line of Molino street; thence northerly along the center line of Molino street to the center line of Fourth street; thence easterly along the center line of Fourth street to the prolonged center line of Santa Fe avenue; thence northerly along said prolonged center line of Santa Fe avenue to the center line of First street; thence easterly along the center line of First street to the center line of Center street; thence northerly along the center line of Center street to the center line of Aliso street; thence westerly along the center line of Aliso street to the center line of Alameda street; thence northerly along the center line of Alameda street to the center line of San Fernando street; thence southeasterly following the line of the Southern Pacific Railway on Redondo street and Alhambra avenue to the official bed of the Los Angeles river; thence southerly along the official bed of the Los Angeles river to the point of beginning.

Section 2. The City Clerk shall certify to the passage of this Ordinance and shall cause the same to be published once in The Los Angeles Daily Journal, and thereupon and thereafter it shall take effect and be in force.

By this ordinance an attempt was made to cut out and eliminate from the territory described in the ordinance of August 26th, 1901, the land that had been purchased by Mrs. Dobbins, and being the premises on which she was erecting the gas works under her permit from the Board of Fire Commissioners and upon which premises the complainant was erecting

the water tank and gas holder under its contract with the Valley Gas & Fuel Company.

From the time of the granting of the permit to the said Caroline W. Dobbins by the Board of Fire Commissioners of the City of Los Angeles on the 22nd day of November, 1901, and until the 25th day of February, 1902, the Valley Gas & Fuel Company was peaceably and lawfully engaged in the erection of the gas works for said Caroline W. Dobbins upon the premises aforesaid and complainant was peaceably and lawfully engaged in the erection of the water tank and gas holder hereinbefore described and nothing was done by the City of Los Angeles in reference to the enforcement of this alleged ordinance of November 25th, 1901, until about the 25th day of February, 1902, when the City of Los Angeles combining and confederating with one James R. C. Burton and with divers and sundry persons to complainant unknown, in the name of the people of the state of California, instituted a proceeding in the police court of the City of Los Angeles against F. A. Smith and Thaddeus Lowe, then in the employ of the Valley Gas & Fuel Company, in the erection of said gas works on the premises of the said Caroline W. Dobbins as hereinbefore described, charging the said F. A. Smith and the said Thaddeus Lowe with having committed a misdemeanor in that they did wilfully and unlawfully erect and cause to be erected certain works, establishments and manufactories for the manufacture of gas, and a certain tank, reservoir and receptacle for the storage of gas within the corporate limits of the said city of Los Angeles described in said

purported ordinance, attempted to be passed by the City Council of the City of Los Angeles on the 25th day of November, 1901, last hereinbefore referred to, and thereupon, upon the complaint filed in said proceeding in said Police Court of the City of Los Angeles, on the 27th day of February, 1902, caused the arrest and detention of said Thaddeus Lowe and F. A. Smith upon a warrant issued by the Judge of said Police Court of the City of Los Angeles, for the alleged violation of said city ordinance.

On the first day of March, 1902, the City of Los Angeles, again combining and confederating with the said James R. C. Burton and with divers and sundry persons to the complainant unknown, instituted another proceeding in the Police Court of the City of Los Angeles against the said F. A. Smith, Thaddeus Lowe and four other persons then and there in the employ of the said Valley Gas & Fuel Company in the erection of said works on the premises of the said Caroline W. Dobbins hereinbefore described, engaged in carrying out said contract on behalf of the said Valley Gas & Fuel Company with the said Caroline W. Dobbins, charging them as in the last complaint described; and on the first day of March, 1902, caused the arrest and detention of the said F. A. Smith, Thaddeus Lowe and the four other persons then mentioned in the warrant issued by the Judge of the said Police Court of the City of Los Angeles, for the violation of said ordinance.

That afterwards, on the first day of March, 1902, the said defendant, the City of Los Angeles, again

combining and confederating with the said James R. C. Burton and with divers and sundry other persons to the complainant unknown, in the name of the people of the state of California, instituted another proceeding in the Police Court of the City of Los Angeles against the said F. A. Smith, Thaddeus Lowe and fourteen other persons then and there in the employ of the Valley Gas & Fuel Company and in the employ of the complainant in the erection of the said gas works on the premises of the said Caroline W. Dobbins, hereinbefore described, in the carrying out of the said contract between complainant and the Valley Gas & Fuel Company and of the contract between the Valley Gas & Fuel Company and Caroline W. Dobbins aforesaid, charging the said persons in said complaint named with having committed a misdemeanor as in said first complaint alleged, and thereupon, upon the first day of March, 1902, caused the arrest and detention of said persons in said complaint mentioned, sixteen persons in all, upon a warrant issued by the Judge of the said Police Court of the City of Los Angeles for the alleged violation of the said alleged city ordinance last hereinbefore set forth.

Complainant averred that the arrest and detention of the said employees of complainant seriously interfered with and interrupted the work of complainant in carrying out its said contract so entered into with the Valley Gas & Fuel Company and was in violation of the rights of the complainant as acquired under and by the said contract.

Complainant set forth that on the 3rd day of March, 1902, the City of Los Angeles recogniz-

ing the invalidity of the alleged ordinance attempted to be passed and adopted by the City Council of the City of Los Angeles November 25th, 1901, as hereinbefore set forth, attempted by its Mayor and council to pass another purported ordinance entitled "An ordinance amending ordinance number 6663, new series, entitled 'An ordinance prohibiting the erection or maintenance of gas works, gas tanks or reservoirs, within certain portions of the City of Los Angeles' approved August 26th, 1901, by amending section one of said ordinance," which said purported ordinance is in words and figures as follows:

ORDINANCE NO. 7029.

(New Series.)

An Ordinance amending Ordinance No. 6663, New Series, entitled, "An Ordinance prohibiting the erection or maintenance of gas works, gas tanks or reservoirs within certain portions of the City of Los Angeles," approved August 26, 1901, by amending section 1 of said Ordinance.

The Mayor and Council of the City of Los Angeles do ordain as follows:

Section 1. That section 1 of Ordinance No. 6663, New Series, entitled, "An Ordinance prohibiting the erection or maintenance of gas works, gas tanks or reservoirs within certain portions of the City of Los Angeles," approved August 26, 1901, be and the same is hereby amended to read as follows:

Section 1. It shall be unlawful for any person, firm or corporation to erect or cause to be erected, maintain or cause to be maintained, any works, establishment or manufactory for the manufacture of gas; or any tank, reservoir or

other receptable for the storage of gas within the corporate limits of the City of Los Angeles, outside of the limits of the district described as follows, to-wit:

Beginning at the intersection of the center line of the official bed of the Los Angeles River with the south charter boundary line of the City of Los Angeles; thence westerly along said south charter boundary line to the center line of Santa Fe avenue; thence northerly along the center line of Santa Fe avenue to the center line of Violet street; thence westerly along the center line of Violet street to the center line of Wilson street; thence northerly along the center line of Wilson street to the Center line of Atlantic street; thence westerly along the center line of Atlantic street to the center line of Alameda street; thence northerly along the center line of Alameda street to the center line of Palmetto street; thence easterly along the center line of Palmetto street to the center line of Molino street; thence northerly along the center line of Molino street to the center line of Fourth street; thence easterly along the center line of Fourth street to the prolongation southerly of the center line of Santa Fe avenue; thence northerly along said prolonged center line of Santa Fe avenue and along the center line of Santa Fe avenue to the center line of First street; thence easterly along the center line of First street to the center line of Center street; thence northerly along the center line of Center street to the center line of Aliso street; thence westerly along the center line of Aliso street to the center line of Alameda street; thence northerly along the center line of Alameda street to Main street; thence along Main street to the intersection of Main and San Fernando streets; thence northeasterly along the center line of San Fernando street to the center line of Redondo street; thence southeasterly, following the line of the Southern Pacific railway on Redondo street and Alhambra avenue to the official bed

of the Los Angeles river; thence southerly along the official bed of the Los Angeles river to the point of beginning.

The avenue designated herein as Santa Fe avenue, is the avenue lying in the district bounded by the Los Angeles river on the east and Alameda street on the west, and extending in a northerly and southerly direction between these two lines.

Section 2. The City Clerk shall certify to the passage of this Ordinance and shall cause the same to be published once in the Los Angeles Daily Journal, and thereupon and thereafter it shall take effect and be in force.

Complainant alleged that by the passage of this ordinance of March 3rd, 1902, the ordinance of November 25th, 1901, was repealed and was no longer in force and effect.

Complainant averred that it was endeavoring in all respects to carry out and perform its contract with the Valley Gas & Fuel Company and to erect on the premises of the said Caroline W. Dobbins aforesaid the said water tank and gas holder provided for in the contract between complainant and the Valley Gas & Fuel Company, to be used in the erection of the gas works by the Valley Gas & Fuel Company for the said Caroline W. Dobbins, but that the City of Los Angeles, combining and confederating with the said James R. C. Burton and with divers and sundry other persons to the complainant unknown, threatened in the name of the people of the state of California to institute another proceeding in the Police Court of the City of Los Angeles against the employees of complainant and other persons engaged in the erection of said gas works on the premises of the said Caroline W. Dob-

bins, in the employ of the Valley Gas & Fuel Company, in carrying out the contract on behalf of the Valley Gas & Fuel Company with the said Caroline W. Dobbins, and threatened to charge the said employees of complainant with having committed a misdemeanor, charging them and each of them with wilfully and unlawfully erecting or causing to be erected certain works, establishments and manufactory for the manufacture of gas and a certain tank, reservoir and receptacle for the storage of gas within the corporate limits of the City of Los Angeles, and outside of the limits described in said purported ordinance attempted to be passed by the City Council of the City of Los Angeles on the 3rd day of March, 1902, last hereinbefore set forth; and that the City of Los Angeles threatened to cause the arrest and detention of said employees and all other employees of the said complainant engaged in the erection and construction of said water tank and gas holder as hereinbefore set forth, and to imprison and confine the said employees of the complainant for the alleged violation of the said city ordinance.

It is averred that said City of Los Angeles threatens that if the complainant continues to carry on its work in which it is engaged in completing said water tank and gas holder under its contract with the Valley Gas and Fuel Company, that it will arrest all persons employed by complainant engaged in said work until it will have stopped the business of complainant and the performance by complainant of its work in carrying out its contract and will arrest the men employed by the complainant as often as they shall be

found at work for said complainant upon said undertaking, charging them with a violation of said alleged ordinance last aforesaid; and complainant charged that unless the City of Los Angeles was restrained and enjoined by the Circuit Court from carrying out its said threats that the said City of Los Angeles would arrest and continue to arrest the men employed by complainant in conducting its business in the erection of said water tank and gas holder and in carrying out its said contract with the Valley Gas & Fuel Company until said work was stopped.

By an amendment filed to said complaint by leave of Court complainant alleged that ever since the inception of the said enterprise so instituted, commenced and undertaken by the said Caroline W. Dobbins the said defendant, the City of Los Angeles, and the municipal authorities thereof, its officers and agents, have continuously thrown obstacles in the way of the successful completion of the said enterprise of the said Caroline W. Dobbins, and have continuously and systematically attempted to thwart and frustrate the plans of the said Caroline W. Dobbins; and have interfered with and interrupted her said work in various portions thereof, that immediately after the organization, at the instance of and for the benefit of the said Caroline W. Dobbins of the said Valley Gas & Fuel Company, the said City Council of the City of Los Angeles attempted to pass and adopt the Ordinance number 6663, New Series, which was adopted on the 26th day of August, 1901, as aforesaid, entitled "An Ordinance prohibiting the erection or maintenance of gas works, gas tanks or

reservoirs within certain portions of the City of Los Angeles;" and afterwards, when the said Caroline W. Dobbins had purchased, within the district prescribed by the said ordinance last hereinbefore referred to, the land upon which she proposed to erect the said gas works, and when, on or about the 28th day of September, 1901, an application had been made to the Board of Fire Commissioners of the City of Los Angeles for a permit to erect gas works upon said premises, the said City Council considered and deliberated upon an ordinance then and there introduced in said City Council of the City of Los Angeles, entitled "An Ordinance amending Ordinance No. 6663, New Series, entitled 'An Ordinance prohibiting the erection or maintenance of gas works, gas tanks or reservoirs within certain portions of the City of Los Angeles,' approved August 26, 1901, by amending section 1 of said ordinance," the object of said ordinance being to further restrict the limits of the district in the City of Los Angeles in which it was lawful to erect and maintain gas works, by which said ordinance it was proposed to eliminate from the district theretofore described in the alleged ordinance adopted on the 26th of August, 1901, all that portion of said district lying between San Fernando street on the north and west, Sotello street and Leroy street on the south and west, and the Los Angeles river on the east, in which particularly was situated the land owned and purchased by the said Caroline W. Dobbins as aforesaid, and upon which it was proposed by the said Caro-

line W. Dobbins to erect the said gas works; that such proceedings were had in the said City Council of the City of Los Angeles on the presentation and consideration of said ordinance that the same was by the said City Council referred to the Committee on Legislation of said City Council, and thereupon the hearing upon the application theretofore made to the said Board of Fire Commissioners was suspended, and the same continued entirely suspended by the said Board of Fire Commissioners while the said matter was pending before the said Committee on Legislation of the said City Council of the City of Los Angeles, and for upwards of two weeks; that during the time that said application for a permit to erect gas works upon the premises of the said Caroline W. Dobbins above referred to was still pending before the said Board of Fire Commissioners as aforesaid, and while the question of the adoption of the said proposed ordinance was still pending before the said Legislative Committee of the said City Council, the said Board of Fire Commissioners were induced to consider and did consider and agree to the adoption of a certain rule and regulation in reference to applications for permits to erect gas works, which said rule and regulation is hereinafter referred to; that after such determination of the said Board of Fire Commissioners to adopt said rule and regulation hereinafter referred to, said proposed ordinance proposing to restrict the limits of said district in which it was lawful to erect gas works as aforesaid came before the said City Council of the City of Los Angeles on

the report of the said Legislative Committee, the said Legislative Committee having reported against the adoption of the said ordinance; and thereupon, at the next meeting of the said Board of Fire Commissioners of the City of Los Angeles the said rule and regulation hereinafter referred to, having theretofore been considered by the said Board of Fire Commissioners as aforesaid, was, at the meeting of the Board of Fire Commissioners on or about the 25th day of October, 1901, adopted, in words and figures as follows: "Whereas, applications are on file with this Board for permission to erect gas manufacturing plants at different points within the district to which said plants are limited; and, whereas, a very great majority of the property owners living in the vicinity of locations for which applications are made protest against the granting of permits; and, whereas, this Board is satisfied that the respective applicants for permission to build are attempting to engage in the business of the distribution of gas for general purposes, including its use for fuel and power, without first procuring a franchise from the city for said right; now, therefore, be it resolved, that all applications now pending before this Board for permission to erect gas manufacturing plants are hereby denied; that, hereafter, in all cases where an application for permission to erect a gas manufacturing plant shall be made to this commission the said application shall state whether or not the gas so manufactured is to be supplied to the inhabitants of the City of Los Angeles for illuminating purposes only. Said application shall be verified by the oath of the applicant, and in case it shall appear to the commission that no proper ground exists for the denial of the application, and that said gas is to be used for illuminating purposes only, the same shall be forthwith granted. But in case it shall appear that the gas is to be furnished for general purposes, such as fuel, power, etc., then the applicant therefor must procure a franchise from the City of Los Angeles to distri-

bute gas before his said application will be finally granted by this commission," the effect of which rule was to dismiss and deny the application theretofore made for permission to erect gas works upon the premises of the said Caroline W. Dobbins as hereinbefore set forth; that afterwards, on the 1st day of November, 1901, the said Caroline W. Dobbins having complied with all the rules and regulations of the said Board of Fire Commissioners, made an application on her own behalf for a permit to erect gas works upon said premises hereinbefore described, and afterwards, on the 22nd day of November, 1901, the said Board of Fire Commissioners granted the said permit to the said Caroline W. Dobbins as hereinbefore set forth, and thereupon the said City Council of the City of Los Angeles, as soon thereafter as they met, to-wit, on the 25th day of November, 1901, attempted to pass and adopt the ordinance No. 6779, New Series, entitled "An Ordinance amending Ordinance No. 6663, New Series, entitled 'An Ordinance prohibiting the erection or maintenance of gas works, gas tanks or reservoirs within certain portions of the City of Los Angeles,' approved August 26, 1901, by amending section 1 of said ordinance," as hereinbefore set forth; that in addition to the acts of the said municipal authorities of the said City of Los Angeles hereinbefore set forth, on or about the 7th day of October, 1901, the said City Council of the City of Los Angeles attempted to pass a certain other purported ordinance known as Ordinance No. 6726, New Series, entitled "An Ordinance prohibiting the use of any public street or thorough-

fare in the City of Los Angeles for the purpose of laying down or maintaining therein any pipe, conduit or connections therewith without a franchise," wherein and whereby the said City of Los Angeles attempted to ordain that it should be unlawful for any person, firm or corporation to lay down any pipe, conduit or connections therewith in any public street or thoroughfare in the City of Los Angeles for the purpose of supplying said city or its inhabitants with fresh water or with gas used exclusively for illumination or with other illuminating light, without first obtaining a permit from the Superintendent of Streets to make the necessary excavations therefor, and that any person, firm or corporation desiring to obtain such permit should file with the Superintendent of Streets an application therefor in writing, setting forth the public streets or thoroughfares and the particular portions thereof which it was desired to excavate, the size and character of the excavation to be made, and specifically the purpose for which the pipe, conduit or connection therewith was to be used, whether for water, gas or electricity, and if for gas or electricity that said gas or electricity was to be supplied solely to said city or its inhabitants to be used exclusively for illumination, and that said application must be verified by the oath of such person, or by the oath of a member of such firm or by the oath of the president and secretary of such corporation as the case may be; that thereafter, when the said Caroline W. Dobbins desired to make an application for permit to excavate the streets of the City of Los Angeles for the

purpose of laying pipes in order to distribute to the citizens of the City of Los Angeles gas by her to be manufactured, for the purpose of supplying them with artificial light, the Superintendent of Streets of the City of Los Angeles unlawfully required of the said Caroline W. Dobbins an application therefor in writing, setting forth the public streets and thoroughfares, and the particular portions thereof, which it was desired by the said plaintiff to excavate, the size and character of the excavations to be made, and specifying the purpose for which the pipe, conduit or connections therewith was to be used, and that said gas was to be supplied solely for the city or its inhabitants to be used exclusively for illumination, and required that the said application should be verified by the oath of the said Caroline W. Dobbins, all of which requirements were unlawful and were for the purpose of annoying, harrassing, impeding, hindering and delaying the said Caroline W. Dobbins in her attempt to carry out successfully the lawful enterprise in which she was engaged; that thereafter, in addition to the adoption of the said purported ordinance so attempted to be adopted by the City Council of the City of Los Angeles, and in addition to the acts of the said Superintendent of Streets of the City of Los Angeles hereinbefore set forth, the said City of Los Angeles, through its City Attorney, prosecuted the proceedings instituted by the said James R. C. Burton hereinbefore set forth for the arrest of and detention of the men employed in the construction and erection of the said gas works of the said Caroline W. Dobbins, all

of which acts and doings on the part of the City of Los Angeles, its municipal authorities, officers and agents as hereinbefore set forth the said complainant charged and averred were for the purpose of hindering, harrassing, impeding, delaying and frustrating the efforts and attempts of the said complainant and said Caroline W. Dobbins to carry out the lawful business and enterprise so undertaken by her as aforesaid, and were instituted and prosecuted for the purpose of compelling the said complainant and the said Caroline W. Dobbins to stop and abandon the further prosecution of said enterprise.

It is alleged in said complaint upon information and belief that the said defendant, the City of Los Angeles and the municipal authorities, officers and employes thereof were in their acts and doings hereinbefore set forth wilfully and unlawfully instigated, advised and controlled by the officers, attorneys, agents and employes of the Los Angeles Lighting Company, a corporation organized under the laws of the State of California, engaged in the manufacture and supplying of gas in the City of Los Angeles, and which said company has, for upwards of ten years last past, enjoyed a monopoly of the gas business in the said City of Los Angeles; that said Los Angeles Lighting Company, through its officers, attorneys, agents and employes, has had sufficient influence with the municipal government of the City of Los Angeles, and with its officers, to bring about the passage and adoption of the alleged ordinances hereinbefore set forth, which the said City Council of the City of Los Angeles has attempted to adopt since the com-

mencement of the enterprise undertaken by the said Caroline W. Dobbins and has had sufficient influence with the officers and employes of the said City of Los Angeles to compel them to enforce and attempt to enforce the alleged ordinances so attempted to be passed and adopted by the City Council of the City of Los Angeles as aforesaid against the said Caroline W. Dobbins, her agents, contractors and employes engaged in the erection of said gas works and the laying of pipes in the streets of the City of Los Angeles on behalf of the said Caroline W. Dobbins in enabling her to carry out the enterprise aforesaid; that all of said ordinances attempted to be passed and adopted by the City Council of the City of Los Angeles restricting the limits of the City of Los Angeles in which it was lawful to erect gas works as prescribed by the ordinance adopted by the City Council of the City of Los Angeles on the 26th day of August, 1901, herein set forth, were prepared by the attorneys and agents of the said Los Angeles Lighting Company and by them presented to the members of the City Council of the City of Los Angeles for adoption; that before the attempted adoption of the said alleged ordinance of the 25th day of November, 1901, hereinbefore set forth, the said Los Angeles Lighting Company, through its attorneys and agents, in order to comply with the rules and regulations of the said City Council that before the passage of any ordinance a printed copy thereof should be furnished to each of the members of the City Council of the said City of Los Angeles, caused to be printed and dis-

tributed to the members of the City Council of the City of Los Angeles, printed copies of the proposed ordinance, which the said City Council afterwards, on the 25th day of November, 1901, attempted to adopt and pass as aforesaid; that the said Street Superintendent of the City of Los Angeles, under the restrictions purporting to be placed upon him by the City Council of the City of Los Angeles by the attempted adoption of the alleged ordinance number 6726, New Series, last herein referred to, being compelled to demand of the said Caroline W. Dobbins a verified application for a permit to open the streets of the City of Los Angeles for the purpose of laying pipes therein for the purpose of distributing gas by her to be manufactured, contrary to the rights of the said Caroline W. Dobbins to use the streets of the said City of Los Angeles for the purpose of laying pipes therein, as guaranteed to her by section 19, article XI, of the constitution of the State of California, thereupon the said Los Angeles Lighting Company, its agents and employes, caused to be and had printed and caused to be delivered by its agents to the said Superintendent of Streets of the City of Los Angeles, printed blanks prepared by their attorneys for applications for permits to excavate in public streets of the City of Los Angeles; that the said Los Angeles Lighting Company, its officers and agents, combining and confederating with the said James R. C. Burton and with divers and sundry persons to the said complainant unknown, have compelled the City Attorney of the City of Los Angeles and his

deputies and assistants to prepare the complaints in the proceedings instituted by the said James R. C. Burton in the name of the People of the State of California against the employes of the said Caroline W. Dobbins and her said contractor, the complainant, engaged in the erection of the said gas works as hereinbefore set forth, and have induced the filing of said complaints and the issuance of the warrants thereon and the arrest and imprisonment and detention by the officers of the City of Los Angeles of the said employes; and that the said Los Angeles Lighting Company, by its officers, attorneys, agents and employes, has boasted and threatened that if the said prosecutions so instituted by the said James R. C. Burton against the employes of the said Caroline W. Dobbins and her said contractors shall fail, and if the said ordinances hereinbefore set forth shall be declared void and invalid, they will, by their influence, and their efforts, secure the passage by the City Council of the City of Los Angeles of an ordinance regulating the gas business in the City of Los Angeles and requiring the payment of a license, which license they have boasted and threatened shall be prohibitory in its nature and so high as to prevent the said Caroline W. Dobbins from carrying on the business of manufacturing and distributing gas within the City of Los Angeles.

Complainant further alleges that each and every of the acts aforesaid so performed by the City of Los Angeles, its officers, agents and employes, were done and performed, not for the purpose of protecting any

public interest or preserving any public right, but that said acts and each of them were suggested and formulated by the said Los Angeles Lighting Company, its officers, attorneys, agents and employes, solely for the purpose of protecting the said Los Angeles Lighting Company in the enjoyment of that monopoly which has continued for upwards of ten years, as hereinbefore alleged, and for the purpose of depriving the said Caroline W. Dobbins of vested rights in property and of the privilege of pursuing her lawful undertaking and enterprise as the same is hereinbefore specifically set forth.

It is further alleged that the territory surrounding the premises of the said Caroline W. Dobbins hereinbefore described, in which the said gas works of the said Caroline W. Dobbins are being erected and which was by ordinance No. 6663, New Series, hereinbefore set forth, a portion of the territory within which the City of Los Angeles permitted the maintenance of gas works, is and was a district devoted to manufacturing and commercial enterprises almost exclusively; that in said district prior to the purchase of the property herein described by the said Caroline W. Dobbins and upon which the said gas works are being erected for said Caroline W. Dobbins as aforesaid, there was in operation a soap factory; that at all times since the 1st day of August, 1901, there has been and is now maintained within the district bounded by Redondo and Alhambra streets, the Los Angeles river and San Fernando street, in said City of Los Angeles,

one wool-pulling factory, which is directly across North Main street from the said premises of the said Caroline W. Dobbins, three wineries, numerous oil wells in operation, an extensive iron foundry in active operation, a brass foundry, and an extensive oil refinery; and that there is a great deal of vacant and unoccupied land which is and will continue to be comparatively worthless except for the purposes of the erection thereon of manufacturing establishments; that immediately adjacent to the easterly line of said district last herein described are the tracks of the Southern California Railway, on which are operated the freight and passenger trains of the Santa Fe railroad; that east of that and adjacent thereto is the Los Angeles river, and that east thereof is the right-of-way and tracks of the San Pedro, Los Angeles and Salt Lake railroad; that immediately east of those tracks an extensive tannery is located and in operation; that immediately north of said district and north of San Fernando street, and adjacent to the tracks of the Santa Fe railroad are the oil tanks and refinery of the Standard Oil Company in extensive operation; that prior to the granting of the permit by the Board of Fire Commissioners of the City of Los Angeles to the said Caroline W. Dobbins on the 22nd day of November, 1901, the said Board of Fire Commissioners and the members of the said commission individually and jointly visited and examined the said premises and the said district surrounding the same, and having heard the protests of all persons who ap-

peared before them, decided and determined by the granting of said permit that said premises were in all respects a suitable place upon which to erect the said gas works and to conduct the business of manufacturing gas.

It is alleged that said gas works are being constructed and are to be completed upon concrete foundations, with a superstructure of brick, steel and iron, of the best material procurable, and are not combustible, and that the same are so firmly and substantially constructed that there can be no danger from explosions, bursting or leakage; that all the machinery now in place therein or to be placed therein is of the most approved pattern, and constructed in accordance with the latest devices and improvements known in the manufacture of gas; that said works can and will be operated and maintained by the said Caroline W. Dobbins by the use of the said devices and improvements and the said machinery therein contained, so that there will be no leakage or escape of odors, and that the same will not create a nuisance and will not interfere in any way with the health, comfort, safety or welfare of the inhabitants of the said district and territory in which the said gas works are located upon the premises of the said Caroline W. Dobbins as hereinbefore described or of any other of the inhabitants of the said City of Los Angeles.

In its original bill of complaint, complainant avers that if the City of Los Angeles should be allowed to arrest and continue to arrest the employes of the

complainant so engaged in the building of said water tank and gas holder and in carrying out its contract with the Valley Gas & Fuel Company and if the City of Los Angeles was allowed to carry its threats into execution, the complainant would suffer great and irreparable loss; that the work already performed by the complainant in carrying out said contract consisted of there being placed upon the premises of the said Caroline W. Dobbins hereinbefore described, a large quantity of steel plates ready to be put in place in said water tank and gas holder and of having partially erected on said premises the water tank hereinbefore set forth, all of which were exposed to the elements and in imminent danger of being utterly destroyed by the action of the elements and were of great value to the complainant, costing upwards of the sum of $8000; that complainant had been forced to employ in the construction of said water tank and gas holder skilled mechanics and had brought them from divers and sundry places at great distances from the City of Los Angeles as hereinbefore set forth, and that if the said city was allowed to execute its said threats of arresting said men, said men threatened to and would leave the employment of complainant and if said work should be retarded and interrupted by reason of said threats and interruption thereof by said City of Los Angeles, as it would if said threats were executed, the said skilled laborers and mechanics so employed by complainant would become scattered and complainant would not be able again to obtain their services, or the services of like men in such employment, all of which would cause

the complainant great and irreparable damages; that complainant would have no adequate remedy at law and would not be able to carry out the contract entered into between the complainant and the said Valley Gas & Fuel Company and that there would result innumerable actions at law and a multiplicity of suits, which would have to be instituted at great expense and all without any possibility of complainant recovering indemnity for said expenses; that complainant had already done work in carrying out said contract amounting to upwards of the sum of $9000 and had only received on account thereof the sum of $3000 and could not and would not be able to recover the sums of money already expended by it and the expenses incurred by it in attempting to carry out its lawful contract with the Valley Gas & Fuel Company as it would not on its part be able to fulfill and carry out the same according to the terms thereof; that the damages sustained by complainant in being unable to complete said contract as hereinbefore set forth would be upwards of $10,000.

Complainant averred that the City of Los Angeles combining and confederating with divers and sundry persons to complainant unknown has attempted to and has interfered with the rights of complainant and with the prosecution of the work undertaken by complainant as aforesaid, and the City of Los Angeles threatens and intends to proceed against complainant and its employes until complainant is compelled to desist from the completion of said contract, all of which acts and doings on the part of the City of Los Angeles were in

violation of the rights of complainant and contrary to equity and good conscience.

Complainant also filed by leave of court a supplemental bill alleging that since the filing of the original bill the City of Los Angeles again combining and confederating with James R. C. Burton and with divers and sundry persons to the complainant unknown, in the name of the people of the State of California instituted another proceeding in the Police Court of the City of Los Angeles against Thaddeus Lowe, F. A. Smith, Martin Daly and twenty-one other persons, the said Thaddeus Lowe and the said F. A. Smith being in the employ of the Valley Gas & Fuel Company and all of the other said persons being in the employ of the complainant in the erection of said gas works on the premises of said Caroline W. Dobbins in the carrying out the said contract between complainant and the said Valley Gas & Fuel Company, and of the contract between the Valley Gas & Fuel Company and the said Caroline W. Dobbins, charging the said Thaddeus Lowe, the said F. A. Smith and the said Martin Daly and the said twenty-one other persons with having committed a misdemeanor in that they did wilfully and unlawfully erect and cause to be erected, maintain and cause to be maintained, certain works, establishments and manufactory for the manufacture of gas, and a certain water tank and reservoir and receptacle for the storage of gas within the corporate limits of the city of Los Angeles outside of the limits of that district as described in the purported ordinance attempted to be passed by the said council of the city

of Los Angeles on the 3rd day of March, 1902, as last hereinbefore set forth, and that thereupon, upon the complaint filed in said proceeding in said police court that said city of Los Angeles did cause the arrest and detention of the said Thaddeus Lowe, F. A. Smith and Martin Daly and the twenty-one other persons above referred to, upon a warrant issued by the Judge of the said Police Court of the city of Los Angeles for the alleged violation of the said city ordinance; and complainant alleged that by the arrest and detention of said employes of the complainant as last hereinbefore set forth, complainant was compelled to desist and refrain from further work on its said contract of erecting said water tank under its said contract for erecting said water tank and gas holder described in said complaint and that said arrest of said men and employes was in violation of the rights of complainant as in said original bill of complaint set forth.

The prayer of the complaint was for a temporary injunction restraining the defendant, the City of Los Angeles, from enforcing the alleged ordinance number 6779, adopted on the 25th day of November, 1901, or enforcing the alleged ordinance number 7029 adopted on the 3rd day of March, 1902, against the complainant or any of its agents or employes, and from preventing the complainant from carrying out and prosecuting the said work of erecting the said water tank and gas holder upon the premises described in said complaint, and that upon the final hearing of said cause that the said defendant may be perpetually enjoined from further continuing in any of the acts last

hereinbefore specifically set forth; and for general relief.

To this complaint, on the 10th day of March, 1902, the defendant the City of Los Angeles filed a demurrer and for cause of demurrer alleged that by said bill of complaint it appeared that complainant was not entitled to the relief prayed for by the bill against the defendant; that by said bill of complaint it appeared that said plaintiff was not entitled to any relief against the said defendant and that it appeared by said bill that said Circuit Court had no jurisdiction of the subject matter or of the person of the said defendant; or no jurisdiction of the subject matter of said suit.

A motion was made for a temporary injunction and on the hearing of this motion and of the demurrer the court determined that the jurisdiction of the court did not exist and for that reason the temporary injunction applied for was refused and the demurrer was sustained and the bill dismissed for want of equity. From the order and decree entered in said cause sustaining the demurrer and dismissing the bill for want of equity and for costs the complainant appealed to this court.

It is averred in the complaint that the ordinances as attempted to be adopted by the city council of the city of Los Angeles on the 25th day of November, 1901, and on the 3rd day of March, 1902, were void and invalid in that they were uncertain and unreasonable and were an attempt to regulate in an unlawful manner and without authority, the business of erecting gas works within the city of Los Angeles;

That they were in violation of the rights of complainant secured to it by virtue of its contract entered into between it and the Valley Gas & Fuel Company and were in violation of the rights secured to the said Caroline W. Dobbins by the City of Los Angeles on the 22nd day of November, 1901;

And were in violation of the provisions of the Constitution of the United States prohibiting the passing of any laws impairing the obligation of contracts.

The ordinances of November 25th, 1901, and of March 3rd, 1902, are void and invalid and are in violation of the provisions of the constitution of the State of California, and also the provisions of the Fourteenth Amendment of the constitution of the United States, in that it is an attempt on the part of the City of Los Angeles to make and enforce laws which abridge the privileges and immunities of the citizens of the United States, in that it is an attempt to prohibit the erection or maintenance of any works, establishment or manufactory for the manufacture of gas or the storage of gas within the corporate limits of the city of Los Angeles, except within the limits described in said ordinance, for that said business of erecting and maintaining gas works is not a nuisance, but is a lawful occupation and protected by the provisions of Article Eleven, section 19, of the constitution of the State of California.

Said ordinances are void and invalid and in violation of the provisions of the Fourteenth Amendment of the constitution of the United States as intended to deprive the said plaintiff of its property without due process of law.

Said ordinances are in violation of the Fourteenth Amendment of the constitution of the United States as denying to all persons within the jurisdiction of the city of Los Angeles the equal protection of the laws and as being passed in an attempt on the part of the City of Los Angeles to foster a monopoly and to protect the Los Angeles Lighting Company in the enjoyment of a monopoly in the business of manufacturing and distributing gas in the city of Los Angeles and for the purpose of discriminating against the said complainant and to prevent it from erecting other gas works within the limits of the city of Los Angeles.

SPECIFICATIONS OF ERROR.

I.

The court below erred in denying the motion made by the appellant for a preliminary injunction.

II.

The court below erred in holding that a court of equity was without jurisdiction to enjoin criminal prosecutions under a statute or ordinance alleged to be unconstitutional, even though it was alleged that it is the purpose of such prosecutions to injure complainant in its property rights and that such would be their effect.

III.

The court erred in not determining that the ordinances of the city of Los Angeles adopted November 25th, 1901, and March 3rd, 1902, were void and in-

valid and in violation of the provisions of the constitution of the United States as against the said complainant.

IV.

The court erred in sustaining the demurrer filed by the defendant to the complainant's bill.

V.

The court erred in dismissing the complainant's bill for want of equity.

BRIEF.

The foundation of this action lies in the invalidity of the ordinances of November 25th, 1901, and of March 3rd, 1902, adopted by the City Council of the City of Los Angeles, alleged in the bill of complaint to be in contravention of the provisions of the constitution of the United States. An appeal, therefore, lies directly from the Circuit Court to this Court, and this Court having jurisdiction of this case for the purpose of determining whether such ordinances are in contravention of the Constitution of the United States, there exists the power in this Court to consider all other questions arising on the record.

Act of March 3rd, 1891, Chapter 517, Section 5; 26 Statutes at Large, 826.

Horner v. United States, 143 U. S. 570.

Chappell v. United States, 160 U. S. 499.

Loeb v. Columbia Bank Trustees, 179 U. S. 472, 478.

Penn Mutual Life Insurance Company v. Austin, 168 U. S. 685, 695.

II.

The ordinances in question of the City of Los Angeles were but the exercise by the city of the legislative powers delegated to it by the State, and were, therefore by legal intendment the equivalent of laws enacted by the State itself.

Penn Mutual Life Insurance Company v. Austin, supra, p. 694.

City Railway Company v. Citizens' Street Railroad Company, 166 U. S. 557, 563.

St. Paul Gaslight Company v. St. Paul, 181 U. S. 142, 148.

III.

The ordinance number 6779 of November 25th, 1901, was repealed by the ordinance number 7029 of March 3rd, 1902. The ordinances are on the same subject matter. The latter ordinance covers the whole subject matter of the earlier and will repeal the former.

23 *American and English Encyclopedia of Law*, 485.

IV.

The ordinance of March 3rd, 1902, is invalid for the reason that it is in violation of the Constitution of the United States in that it impairs the obligation of the contract between appellant and the Valley Gas

& Fuel Company to erect and construct the water tank and gas holder upon the premises of Caroline W. Dobbins.

Farrington v. Tennessee, 95 U. S. 679.

Sturgess v. Crowninshield, 4 Wheat. 122.

City Railroad Company v. Citizens' Street Railroad Co., supra.

Detroit v. Detroit Citizens Street Railroad Co., 184 U. S. 368.

V.

The ordinance of March 3rd, 1902, is invalid for the reason that it is in violation of the vested rights acquired by Caroline W. Dobbins, the employer of the appellant by virtue of the purchase by her of lands within the limits of the district within which it was lawful to erect gas works, by the terms of the ordinance adopted August 26th, 1901, and by virtue of the permit granted to her by the Board of Fire Commissioners of the City of Los Angeles on the 22nd day of November, 1901, under the existing "Building and Fire Ordinance" of the City of Los Angeles.

(a) The rights acquired by Caroline W. Dobbins, the employer of the appellant, were vested rights.

Section 101 of the Building ordinance of the City of Los Angeles is as follows: "It shall be unlawful for any person, firm or corporation to erect or cause to be erected, maintain or cause to be maintained, occupy or cause to be occupied, any * * * * gas works or other factory where power other than

animal power is used, within the corporate limits of said city, without a permit from the Board of Fire Commissioners so to do. Before any such permit shall be granted, the Clerk of the Board of Fire Commissioners shall mail a notice to each record owner of real property in the block in which it is intended to erect the building or structure for which a permit is sought, by depositing in the United States postoffice a postal card directed to each such record owner of property at his last known address, notifying said record owner of the fact that such permit is applied for, the nature of the same, and the time and place when and where the application for the granting of the same will be heard. Said Board shall at such hearing give an opportunity to all parties interested to be heard, and shall have power to grant or refuse such permit. The costs of mailing said notice to be first deposited, by said applicant, with the Clerk of said Board."

Calder v. Bull, 3 Dall, 394.

Farrington v. Tennessee, 95 U. S. 679.

Steamship Co. v. Jolliff, 2 Wall. 457.

Worth v. Cransen, 48 U. S. 118.

Classen v. Chesapeake Guano Co. (Md.), 31 Atla. Rep. 808.

Roberts v. Brooks, 71 Fed. Rep. 914.

Baltimore Trust Co. v. Baltimore, 64 Fed. Rep. 153.

Lewis v. City of Newton, 75 Fed. Rep. 884.

Cleveland City Railroad Co. v. City of Cleveland, 94 Fed. Rep. 385.

City Railway Company v. Citizens' Street Railway Co., 166 U. S. 562.

(b) The appellant, as the contractor, doing the work for Caroline W. Dobbins under her permit granted to her by the Board of Fire Commissioners, was entitled to the benefit and protection of the vested rights which she had acquired by virtue of legislative authority.

Reagan v. Farmers Loan & Trust Co., 154 U. S. 362, 393.

VI.

The ordinance of March 3rd, 1902, adopted by the city council of the City of Los Angeles is invalid and void as depriving the appellant of property without due process of law.

City of Chicago v. Netcher, 183 Ill. 104; 55 N. E. Rep. 707.

Frorer v. People, 141 Ill. 171, 31 N. E. 395.

Ramsey v. People, 142 Ill. 380, 32 N. E. 364.

Braceville Coal Co. v. People, 147 Ill. 66, 35 N. E. 62.

Cooley Const. Lim. * 393.

VII.

Police Power.

The ordinance of March 3rd, 1902, is not within the police power, nor is it a proper police regulation.

(a) The determination by the legislative body of what is a proper exercise of the police power is not final or conclusive, but is subject to the supervision of the courts.

People v. Budd, 117 N. Y. 1.

Lawton v. Steele, 152 U. S. 133.

Brandon on the Fourteenth Amendment, p. 172.

(b) The police power has reference to those things which affect the public health, the public safety, the public comfort, or the public morals.

Noel v. People, 187 Ill. 587; 58 N. E. 616.

City of Chicago v. Netcher, supra.

State v. Donaldson, 41 Minn. 74, 42 N. W. 781.

City of Indianapolis v. Consumers' Gas Trust Company, 39 N. E. Rep. (Ind.) 433.

Barthet v. City of New Orleans, 24 Fed. Rep. 564.

City of Buffalo v. Chadeayne (N. Y.) 31 N. E. Rep. 443.

New Orleans Gas Company v. Louisiana Light Company, 115 U. S. 650.

Walla Walla City v. Walla Walla Water Company, 172 U. S. 115.

Distinguished:

Beer Company v. Massachusetts, 97 U. S. 25;

Fertilizing Company v. Hyde Park, 97 U. S. 659.

Stone v. Mississippi, 101 U. S. 814.

Slaughter House cases, 16 Wall. 36.

Butchers' Union Co. v. Crescent City Live-Stock Landing Co., 111 U. S. 746.

Ex parte Lacey, 108 Cal. 326.

Barbier v. Connolly, 113 U. S. 27.

Knoxville v. Bird, 12 Lea. 121.

Davenport v. City of Richmond, 81 Va. 636.

VIII.

1. This ordinance is invalid because it is an attempt on the part of the city council of the City of Los

Angeles to define and make that a nuisance which is not a nuisance *per se*.

(a) Gas works are neither in their erection nor maintenance a nuisance *per se* and it is not within the power of the city council of the city of Los Angeles to pass an ordinance making that a nuisance which is not a nuisance *per se*, nor could such a declaration make it a nuisance unless it in fact had that character.

New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 560.

Yates v. Milwaukee, 10 Wall. 497.

C. R. I. & P. R. R. v. Joliet, 79 Ill. 25, 44.

C. R. I. & P. R. R. v. Joliet, 79 Ill.

Everett v. Council Bluffs, 46 Iowa, 66.

Ex parte Sing Lee, 96 Cal. 354.

County of Los Angeles v. The Hollywood Cemetery Association, 124 Cal. 344.

Grossman v. Oakland (Oregon), 36 L. R. A. 593.

Stockton Laundry Case, 31 Fed. 680.

In re Hong Wah, 82 Fed. Rep. 623, 624, 626.

Ex parte Whitall, 98 Cal. 73.

Wood on Nuisances, Sec. 744.

(b) The power granted in the City Charter to *abate* nuisances does not give power to *prevent* except in those cases of nuisances *per se*; and those things which only become nuisances because of the method of their operation cannot be prevented and stopped under the power to abate until it has been demonstrated they are nuisances.

Lakeview v. Letz, 44 Ill. 81, 83.

The Charter of the City of Los Angeles is a general law of the State of California. The provisions

thereof showing the powers of the City of Los Angeles in reference to the abatement or prevention of nuisances are as follows:

"Article I. Sec. 13. To license and regulate the carrying on of any and all professions, trades, callings, and occupations carried on within the limits of said city, and to fix the amount of license tax thereon to be paid by all persons engaged in such professions, trades, callings, or occupations, and provide the manner of enforcing the payment of the same; *provided*, that no discrimination shall be made between persons engaged in the same business otherwise than by proportioning the tax upon any business to the amount of business done; and to license, regulate, restrain, suppress, or prohibit any or all laundries, livery and sale stables, cattle and horse corrals, slaughter houses, butcher shops, hawkers, peddlers, pawnbrokers, dance cellars, melodeons, shows, circuses, public billiard tables, bowling and tenpin alleys, and to suppress and prohibit all faro banks, games of chance, gambling houses, tables, or stands, bawdy houses, the keeping of bees within the city limits, and any and all obnoxious, offensive, immoral, indecent, or disreputable places of business, or practice.

Sec. 17. To provide and maintain a proper and efficient fire department, and make and adopt such measures, rules and regulations for the prevention and extinguishment of fires, and for the preservation of property endangered thereby, as may be deemed expedient.

Sec. 22. To make and enforce within its limits such other local, police, sanitary, and other regulations as are not in conflict with general laws, and are deemed expedient to maintain the public peace, protect property, promote the public morals, and to preserve the health of its inhabitants.

Article III. Sec. 25. It may, by ordinance, declare what constitutes a nuisance, and provide for the abatement and removal thereof.

Sec. 27. It shall, by ordinance, regulate, and may prohibit, the keeping of gunpowder, acids, or other explosive, combustible, or inflammable material, within the limits of the city, or any specified part thereof.

Sec. 30. It shall, by ordinance, establish fire districts, and determine the character of buildings that may be erected therein, and the nature of the materials to be used in the construction, alteration, or repair of such buildings, or in the repair or alteration of existing buildings within such limits."

Charter of the City of Los Angeles, Statutes of California 1889, p. 455.

There is no reservation of power in the Charter.

(c) The provision of Section Eleven, Article XI, of the Constitution of the State of California, as follows: "That any county, city or township may make and enforce within its jurisdiction all such local police, sanitary and other regulations as are not in conflict with general laws," is not a grant of police power. It is simply an extension to counties, cities and towns of the right to exercise powers that

are inherent in the legislature as the representative of the poeple; but it is in no sense an enlargement of that power.

Ex parte Campbell, 74 Cal. 20.

Ex parte Roach, 104 Cal. 272.

IX.

The ordinance adopted by the city council of the city of Los Angeles on March 3rd, 1902, is invalid and is not binding upon the plaintiff and is in violation of the provisions of the Constitution of the United States prohibiting any State from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States.

1. It is invalid as being in violation of the rights of the plaintiff to engage and conduct a lawful business of erecting gas works in the city of Los Angeles.

Brandon on the Fourteenth Amendment, p. 65.

Corfield v. Coryell, 4 Wash. C. C., 371; Fed. Cases No. 3230.

(a) The business of erecting or maintaining a gas works is a lawful occupation.

New Orleans Gas Company v. Louisiana Light Co., 115 U. S. 650, 658, 669.

Constitution of the State of California, Article XI, Sec. 19.

Ex Parte Johnston, —— *Cal.* —; 69 Pac. Rep., 973, 975.

People v. Stevens, 62 Cal. 209.

(b) A municipality has not the power or right to impose additional burdens or terms or conditions to the exercise of rights created by the sovereign authority of the State in its Constitution. Restrictions in the exercise of these rights are not regulations and at least impair if they do not deny the exercise of the right.

Ex parte Johnston, supra.

Township of Summit v. N. Y. & N. J. Tel. Co., 57 N. J., Eq. 123.

City of Atlanta v. Gate City Gaslight Co., 71 Ga. 106.

Michigan Telephone Company v. City of Benton Harbor, 121 Mich. 512.

Wisconsin Telephone Company v. City of Oshkosh, 62 Wis. 32.

Appeal of Pittsburg, 115 Pa. 4.

Borrough of Millvale v, Evergreen Railway Co., 131 Pa. 1.

Harrisburg City Pass. R. R. Co. v. City of Harrisburg, 149 Pa. 465.

State v. Flad, 23 Mo. App. 185.

Hodges v. Telegraph Co., 72 Miss. 910.

2. The ordinance is invalid as being unreasonable.

X.

A court of equity has power to restrain by injunction a municipality from instituting criminal proceedings when such criminal prosecutions are threatened under color of an invalid ordinance for the purpose of compelling the relinquishment of a property right.

Central Trust Company v. Citizens' St. R. Co., 80 Fed. Rep. 225; s. c. 82 Fed. 1.

Reagan v. Trust Co., 154 U. S. 362.

Southern Express Co., Mayor, etc., of Ensley, 116 Fed. 756.

Lottery Co. v. Fitzpatrick, 3 Woods, 222, Fed. Cases No. 8,541.

Springhead Spinning Company v. Riley, L. R. 6 Eq. 588.

Osborn v. United States Bank, 3 Wheat. 738.

Wood v. City of Brooklyn, 14 Barb. 425.

Manhattan Iron Works v. French, 12 Abbott's N. C. 446.

Rushville v. Rushville Natural Gas Co., 132 Ind. 575; 15 L. R. A. 321.

Davis v. Fasig, 128 Ind. 271, 27 N. E. Rep. 726.

Platte & D. Canal & Milling Co. v. Lee, Mayor, (Colo.) 29 Pac. Rep. 1036.

Smith v. Bangs, 15 Ill. 399.

Mayor of Baltimore v. Radecke, 49 Md. 218.

Cape May & L. R. Co. v. City of Cape May, 35 N. J. Eq. 409.

Los Angeles City Water Co. v. City of Los Angeles, 103 Fed. Rep. 711.

City of Atlanta v. Gate City Gaslight Co., 71 Ga. 196.

City of Austin v. Austin City Cemetery Association (Tex.) 28 S. W. 528.

Port Mobile v. Louisville & N. Railway Co., 4 Sou. Rep. 106 (Ala.).

Smyth v. Ames, 169 U. S. 466, 517.

Detroit v. Detroit Citizens' St. Railway Co., 184 U. S. 368, 378.

Vicksburg Water Works v. Vicksburg, 185 U. S. 65, 82.

Contra: Opinion of Honorable Olin Wellborn, District Judge, in the case at bar, appearing in the record, reported:

Davis & Farnum Manufacturing Co. v. City of Los Angeles, 115 Fed. Rep. 537.

Distinguished:

Ex parte Sawyer, 124 U. S. 200.

Suess v. Noble, 31 Fed. 855;

M. Schandler Bottling Co. v. Welch, 45 Fed. 283;

Minneapolis Brewing Co. v. McGillivray, 104 Fed. 272.

XI.

The plaintiff has no remedy against the defendant for damages for the wrongful arrest of its employes or for the destruction of its business and property rights.

Stedman v. San Francisco, 63 Cal. 193.

Chope v. Eureka, 78 Cal. 508.

Doeg v. Cook, 126 Cal. 213.

XII.

It is not enough that the plaintiff has a remedy at law. It must be as efficient and as prompt in its administration as the remedy in equity.

Boyce v. Grundy, 3 Peters 377.

Walla Walla City v. Walla Walla Water Co., 172 U. S. 1, 12.

Insurance Co. v. Bailey, 13 Wall. 616, 621.

Kilbourn v. Sunderland, 130 U. S. 505, 514.

Tyler v. Savage, 143 U. S. 79, 95.

2 Story Eq. Sec. 928.

ARGUMENT.

Preliminary to a presentation of the main issues of this case and a discussion of the questions raised thereby, it is to be noticed that, the foundations of this action lying in the invalidity of the ordinances of November 25th, 1901, and of March 3rd, 1902, adopted by the City Council of the City of Los Angeles, alleged in the bill of complaint to be in contravention of the provisions of the Constitution of the United States, an appeal lies directly from the Circuit Court to this Court.

As was said in the case of *Loeb v. Columbia Township Trustees*, 179 U. S. 472, 478:

"It was the purpose of Congress to give opportunity to an unsuccessful litigant to come to this court directly from the Circuit Court in every case in which a claim is made that a State law is in contravention of the Constitution of the United States."

The jurisdiction of this court on such appeal does not depend upon the question whether the right claimed under the Constitution of the United States has been upheld or denied in the court below. *Ibid* 481.

And this Court having jurisdiction of this case for the purpose of determining whether such ordinances are in contravention of the Constitution of the United States, there exists the power in this Court to consider all other questions arising on the record. *Ibid* 481.

Penn Mutual Life Insurance Co. v. Austin, 168 U. S. 685, 695.

Horner v. United States, 143 U. S. 570, 576.
Chappell v. United States, 160 U. S. 499.

The allegations of the complaint fully disclose the nullity of these city ordinances and in what respect they are in violation of the Constitution of the United States. These ordinances were, as has been said by this court in another case, "but the exercise by a city of a legislative power which it assumed has been delegated to it by the State, and were, therefore, in legal intendment, the equivalent of laws enacted by the State itself."

Penn Mutual Life Insurance Company v. Austin, supra, 694.
City Railway Company v. Citizens Street Railroad Co., 166 U. S. 557.
St. Paul Gaslight Company v. St. Paul, 181 U. S. 142, 148.

It is not necessary for this Court to consider specifically the ordinance number 6779, attempted to be adopted by the City Council of the City of Los Angeles, November 25th, 1901, as an amendment to section one of the ordinance of August 26th, 1901, for the reason that an examination of that ordinance disclosed that the designated boundaries therein mentioned did not describe a district. The boundaries are not tied together, and the gap in the description of the district of over one thousand feet of itself rendered the ordinance invalid for indefiniteness. Recognizing this fact, the City Council of the City of Los Angeles adopted the ordinance number 7029 of March 3rd, 1902, the ef-

fect of which was to repeal the ordinance of November 25th, 1901, attempting to cover the same subject matter.

The ordinances are on the same subject matter. The latter covers the whole subject matter of the earlier ordinance, and while not purporting to amend, it plainly shows that it was intended as a substitute for the earlier act. "Such an ordinance will repeal the former ordinance covering the same subject."

23 Am. & Eng. Encyclopedia of Law, 485.

I.

THE ORDINANCE OF MARCH 3RD, 1902, IS INVALID FOR THE REASON THAT IT IS IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES IN THAT IT IMPAIRS THE OBLIGATION OF THE CONTRACT BETWEEN THE APPELLANT AND THE VALLEY GAS & FUEL COMPANY TO ERECT AND CONSTRUCT THE WATER TANK AND GAS HOLDER UPON THE PREMISES OF CAROLINE W. DOBBINS.

About September 1st, 1901, the Valley Gas & Fuel Company entered into a contract to build, construct and erect for Caroline W. Dobbins, on certain premises to be designated by her in the City of Los Angeles, certain gas works. In order to enable the Valley Gas & Fuel Company to carry out its contract with Caroline W. Dobbins appellant on or about the 17th day of September, 1901, at Waltham, in the

State of Massachusetts, entered into a contract with the Valley Gas & Fuel Company to erect on the premises in the city of Los Angeles to be designated by Caroline W. Dobbins, certain portions of said gas works, consisting of water tank and gas holder, in consideration of the payment to appellant by the Valley Gas & Fuel Company of the sum of $13,685 when its work was completed. On the 28th day of September following, Mrs. Dobbins purchased in the City of Los Angeles in the district in which it was then lawful by the ordinance adopted August 26th, 1901, to erect gas works, certain premises and subsequently, on the 22nd day of November, 1901, secured from the Board of Fire Commissioners of the City of Los Angeles, a permit to erect gas works upon said premises. By the Charter of the City of Los Angeles and the ordinances then in force, the Board of Fire Commissioners had power to grant such a permit.

Immediately upon the granting of the permit Mrs. Dobbins gave directions that the gas works for which she had obtained a permit, should be erected upon the premises she had previously purchased for that purpose, and pursuant to the contract between the appellant and the Valley Gas & Fuel Company, directed the appellant to commence the erection of the water tank and gas holder upon the said premises, pursuant to its contract with the Valley Gas & Fuel Company. These gas works were in process of construction at the time of the passage of the ordinance of March 3rd, 1902, and by the enforcement of that

ordinance, appellant was compelled to desist and refrain from further work upon that contract. The City of Los Angeles also threatened that if appellant attempted to carry on the work in which it was engaged that it would arrest all persons employed by appellant until it should have stopped the business of appellant and the performance of its contract with the Valley Gas & Fuel Company.

This act of the City of Los Angeles in the passage and enforcement of this ordinance was an impairment of the obligations of the contract between the appellant and the Valley Gas & Fuel Company and was in violation of the provisions of the Constitution of the United States prohibiting the passage of any law impairing the obligation of a contract.

It is true that the water tank and gas holder had not been completed at the time of the filing of this complaint, nor had the gas works been completely erected for Caroline W. Dobbins under the permit granted by the Board of Fire Commissioners, and it was necessary to continue the work on the water tank and gas holder for three to four weeks longer in order to complete them, but there is no difference in law between executory and executed contracts so far as the power of the city or State to pass any law impairing their obligations is concerned.

The appellant had bound itself to erect upon the premises designated, the water tank and gas holder. It was the right of Caroline W. Dobbins to have the gas works completed and the appellant was under obligation, by the terms of its contract, to erect

and construct the water tank and gas holder according to the terms of the contract and that obligation was one which could be enforced. Were it not for the action of the city authorities of the City of Los Angeles, the performance of the contract was only a question of a short time.

In the case of *Farrington v. Tennessee*, 95 U. S. 679, Mr. Justice Swayne, delivering the opinion of this court, said:

"A compact lies at the foundation of all national life. Contracts mark the progress of communities in civilization and prosperity. They guard, as far as is possible, against the fluctuations of human affairs. They seek to give stability to the present and certainty to the future. They gauge the confidence of man in the truthfulness and integrity of his fellowmen. They are the springs of business, trade, and commerce. * * * *

"The Constitution of the United States wisely protects this interest, public and private, from invasion by State laws. It declares that 'no State shall * * * pass any * * * laws impairing the obligation of contracts.' Art. 1, Sec. 10. This limitation no member of the Union can overpass. It is one of the most important functions of this tribunal to apply and enforce it upon all proper occasions. * * *

"Contracts are executed or executory. A contract is executed where everything that was to be done is done, and nothing remains to be done. A grant actually made is within this category. Such a contract requires no consideration to support it. A gift consummated is as valid in law as anything else. *Dartmouth College v. Woodward*, 4 Wheat. 518. An executory contract is one where it is stipulated by the agreement of minds, upon a sufficient consideration, that something is to be done or not to be done by one or both the parties. Only a slight consideration is necessary. *Pillans v. Van Mierop*, 3 Burr. 1663; *Fourth v. Stanton*, 1 Saund. 210, note 2, and the cases there cited.

"The constitutional prohibition applies alike to both executory and executed contracts, by whomsoever made. The amount of the impairment of the obligation is immaterial. If there be any, it is sufficient to bring into activity the constitutional provision and the judicial power of this court to redress the wrong. Von Hoffman v. City of Quincy, 4 *Wall.* 535.

"The doctrine of the sacredness of vested rights has its root deep in the common law of England, whence so much of our own has been transplanted. Kent, then chief justice, said: It is a principle of that law, 'as old as the law itself, that a statute even of its omnipotent Parliament is not to have a retrospective effect. *Nova constitutio futuris forman imponere debet et non preteritis.* Bracton, lib. 228; 2 Inst. 292.' *Dash v. Van Kleeck*, 7 Johns. (N. Y.) 477. See also *Society &c. v. Wheeler et al.*, 2. Gall. 105, and Broom's Legal Maxims, 34."

The appellant having entered into this contract with a view to the existing ordinances then in force of the City of Los Angeles, and, after the permit had been granted by the Board of Fire Commissioners to appellant's employer, Caroline W. Dobbins, having entered upon the work of the performance of the contract, and expended a large sum of money in attempting to carry out its provisions, the subsequent passage by the city council of the City of Los Angeles of the ordinance of March 3rd, 1902, making it unlawful to erect gas works upon the premises owned by the said Caroline W. Dobbins, and upon which appellant was erecting the gas works, was an impairment of the obligation of the contract between appellant and the Valley Gas & Fuel Company and Caroline W. Dobbins.

In the case of *Sturgess v. Crowninshield*, 4 Wheat. 122, 197, this court said:

"A contract is an agreement in which a party undertakes to do, or not to do, a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract. In the case at bar, the defendant has given his promissory note to pay the plaintiff a sum of money on or before a certain day. The contract binds him to pay that sum on that day: and this is its obligation. Any law which releases a part of this obligation, must, in the literal sense of the word, impair it. Much more must a law impair it which makes it totally invalid, and entirely discharges it."

How much more must a law impair the obligation of a contract which makes it absolutely impossible to perform,—in fact prohibits the performance of the terms of the contract?

After having adopted the ordinance of August 26th, 1901, fixing the limits in which it was lawful, at least by implication to erect gas works, and after having granted to Caroline W. Dobbins the permit to erect gas works, and after the appellant had in the faith of such ordinances entered into a contract to erect the water tank and gas holder upon the premises of Caroline W. Dobbins, and after the granting of the permit by the Board of Fire Commissioners of the City of Los Angeles to erect those gas works, had entered upon the work of constructing the water tank and gas holder necessary therefor, the action of the City of Los Angeles in passing and attempting to enforce the ordinance of March 3rd, 1902, restricting the limits of the district in which by implication it was lawful to erect gas works, was an arbitrary action of the city council and the authorities of the City of Los Angeles and made it impossible

for the appellant to fulfill the terms of its contract.

Whatever may be the rights of the City of Los Angeles to establish a district in which it is lawful or unlawful to erect gas works, such legislation must be exercised in subordination to the principle which secures the inviolability of contracts. But the ordinance in question comes within the prohibition of the Federal Constitution and as against the appellant in this case the ordinance is invalid.

II.

THE ORDINANCE OF MARCH 3RD, 1902, IS INVALID FOR THE REASON THAT IT IS IN VIOLATION OF THE VESTED RIGHTS ACQUIRED BY CAROLINE W. DOBBINS, THE EMPLOYER OF THE APPELLANT, BY VIRTUE OF THE PURCHASE BY HER OF LANDS WITHIN THE LIMITS OF THE DISTRICT WITHIN WHICH IT WAS LAWFUL TO ERECT GAS WORKS BY THE TERMS OF THE ORDINANCE ADOPTED AUGUST 26TH, 1901, AND BY VIRTUE OF THE PERMIT GRANTED TO HER BY THE BOARD OF FIRE COMMISSIONERS OF THE CITY OF LOS ANGELES ON THE 22ND DAY OF NOVEMBER, 1901, UNDER THE EXISTING BUILDING AND FIRE ORDINANCE OF THE CITY OF LOS ANGELES.

(a) The rights acquired by Caroline W. Dobbins, the employer of the appellant, were vested rights.

On the 26th day of August, 1901, the city council of the City of Los Angeles adopted an ordinance prohibiting the erection or maintenance of gas works, gas tanks or reservoirs outside of the limits of a certain district described in the ordinance, and by implication it was lawful to erect gas works within the district described. With this ordinance in force on the 28th day of September, 1901, Caroline W. Dobbins purchased certain premises within that district. At that time there was also in force in the City of Los Angeles an ordinance regulating the manner of constructing, altering, etc., buildings in the City of Los Angeles, and known as the "Building Ordinance," by which it was provided that it should be unlawful for any person to erect a gas works within the City of Los Angeles without a permit from the Board of Fire Commissioners so to do. The Board of Fire Commissioners had power to grant or refuse such permit. Complying with that ordinance, on the first day of November, 1901, Caroline W. Dobbins made application to the Fire Commissioners for permit to erect gas works on the premises which she had purchased within the district within which it was then lawful to erect gas works, which permit, after a hearing in compliance with the ordinance, was on the 22nd day of November, 1901, granted to the said Caroline W. Dobbins. Immediately thereafter she, through her contractors, including appellant, commenced the work of the erection of the gas works upon the premises purchased by her and for which she had obtained the permit from the Board of Fire Commissioners of the City of Los Angeles. Caro-

line W. Dobbins, and her contractors, including the appellant, were vigorously engaged in the erection of said gas works, when the City of Los Angeles attempted to prohibit the further erection thereof by the adoption and enforcement of the ordinance of March 3rd, 1902.

There has never been any dispute or contradiction between counsel for appellant and counsel for appellee, as to the fact that Caroline W. Dobbins acquired vested rights by virtue of her purchase under legislative authority on the 28th day of September, 1901, of the land within the district described in the ordinance of August 26th, 1901, in which by implication it was lawful to erect gas works; by the permit which was granted to her by the Board of Fire Commissioners on the 22nd day of November, 1901; by the acceptance by her of that permit, and the expenditure by her thereunder of large sums of money prior to the passage of the ordinance of March 3rd, 1902.

All the acts of Caroline W. Dobbins in this matter were with a view of abiding by and conforming to the terms of all valid ordinances existing in the City of Los Angeles prior to the 3rd day of March, 1902. It is true that the gas works were not completed at the time of the passage of this ordinance, but they were in process of erection, and as we have heretofore said, there is no difference in law between executory and executed contracts, so far as the power of the city to pass any law which deprives Caroline W. Dobbins of her vested rights. The rights acquired

by Caroline W. Dobbins were vested rights and having been by her lawfully obtained, accepted and acted under, were as inviolable as any rights of property whatever.

It is well understood what is meant by a vested right in property. The grant of the permit to erect gas works, by the Board of Fire Commissioners, having authority for that purpose, conferred rights and privileges upon Caroline W. Dobbins, upon the faith of which it was accepted. The permit was granted at her request for the purpose of enabling her to erect gas works for the purpose of manufacturing, recovering and distributing gas to be supplied to the inhabitants of the City of Los Angeles. By the acceptance of it and the erection of the gas works for the purpose for which the permit was granted, she was engaged at once in the business of supplying a public utility and was under all the obligations involved in such an enterprise.

The acceptance of such undertaking with its correlative obligations imparted an obligation and duty upon the City of Los Angeles, having granted the permit to erect the gas works, which it was not at liberty to disregard, and there was by the grant an implied contract on the part of the City of Los Angeles that the rights and privileges so granted to her should be enjoyed. Mrs. Dobbins thus acquired vested property rights.

In defining what is a vested right, Mr. Justice Chase in the case of *Calder v. Bull*, 3 Dall. 394, has said:

"When I say that a right is vested in a citizen I mean that he has the power to do certain actions or possess certain things according to the law of the land."

As has been well said "everything which may pass under the form of an enactment is not to be considered the law of the land" and we contend that the ordinance of March 3rd, 1902, is not "the law of the land."

When rights are once acquired under legislative authority, claim may then be made to them as protection to property. The conditions of the law having been fulfilled with exactitude, and direct engagements made in reference thereto, the legislative power of interference therewith is limited. An obligation has been produced which cannot be violated and there can be no retrospective legislation that shall affect the vested rights thus acquired.

Farrington v. Tennessee, supra.

See also *Steamship Co. v. Jolliff*, 2 Wall. 457.

Wirth v. Branson, 98 U. S. 118.

Classen v. Chesapeake Guano Co., (Md.) 31 Atla. Rep. 808.

Roberts v. Brooks, 71 Fed. Rep. 914.

Baltimore Trust Co. v. Baltimore, 64 Fed. Rep. 153.

Levis v. City of Newton, 75 Fed. Rep. 884.

Cleveland City Railroad Co. v. City of Cleveland, 94 Fed. Rep. 385.

City Railway Company v. Citizens Street Railway Co., 166 U. S. 562.

Sufficient has been said in this case to show that Caroline W. Dobbins had vested rights in the premises at the time of the adoption and passage of the ordinance of March 3rd, 1902.

(b) The appellant as the contractor doing the work for Caroline W. Dobbins under her permit granted to her by the Board of Fire Commissioners was entitled to the benefit and protection of the vested rights which she had acquired by virtue of legislative authority.

It is wholly immaterial whether the appellant itself acquired vested rights or not so long as it was engaged in performing the work which it was necessary for Caroline W. Dobbins to perform in order to make her acceptance complete of the grant made to her by the City of Los Angeles.

The rights of Davis & Farnum Manufacturing Company were of course dependent upon the rights of Caroline W. Dobbins as secured to her by the permit granted to her by the Board of Fire Commissioners and as in her employ those rights inured to the benefit of the appellant. It was pecuniarily and beneficially and therefore equitably interested in the rights secured to Caroline W. Dobbins and was entitled to the protection thereof.

In the case of *Reagan v. Farmers Loan & Trust Company*, 154 U. S., 362, 393, the complaint was filed by the Farmers Loan & Trust Company, the Trustee in a trust deed executed by the railroad company to secure a bonded indebtedness, against the Railroad Commissioners of the State of Texas, to restrain them from enforcing certain rates which they had adopted and to restrain the Attorney General from instituting any suits against the railroad company, to recover penalties for its failure to con-

form to the rates and abide by the regulations of the Commission.

It was shown that one of the obligations assumed by the corporation railroad was to construct and operate its railroad between the termini named, and on the other hand one obligation assumed by the State was that it would not prevent the company from so constructing and operating the railroad.

This court, p. 393, said: "It is at least a question which arises as to the extent to which that contract goes, and one in which the corporation has a right to invoke the judgment of the courts; and if the corporation, a citizen of the State, has the right to maintain a suit for the determination of that question, clearly a citizen of another State, who has, under authority of the laws of the State of Texas, become pecuniarily interested in, equitably indeed the beneficial owner of, the property of the corporation, may invoke the judgment of the Federal courts as to whether the contract rights created by the charter, and of which it is thus the beneficial owner, are violated by subsequent acts of the State in limitation of the right to collect tolls."

In this case the Davis & Farnum Manufacturing Company had an equitable interest in the permit granted to Mrs. Dobbins to the extent that they were carrying out the contract of erecting the gas works and thereby were to derive the benefits of their work in so doing, and being the beneficiary of the permit, they are entitled to invoke the judgment of the court as to whether the vested rights created under the permit were violated by the subsequent ordinance of the City of Los Angeles.

III.

THE ORDINANCE OF MARCH 3RD, 1902, ADOPTED BY THE CITY COUNCIL OF THE CITY OF LOS ANGELES IS INVALID AND VOID AS DEPRIVING THE APPELLANT OF PROPERTY WITHOUT DUE PROCESS OF LAW.

Caroline W. Dobbins did not acquire by the permit from the Board of Fire Commissioners an exclusive privilege to erect gas works in the City of Los Angeles, nor did she, by the purchase of the real property, acquired by her within the district within which by implication it was lawful under the ordinance of August 26th, 1901, to operate a gas works; but she having acquired that property, and having secured the permit from the Board of Fire Commissioners, and having entered into a contract with the appellant to erect the water tank and gas holder as part of said gas works on the premises purchased by her and the appellant having engaged in said work, foundered all the iron and steel therefor, and placed the same upon the ground and partially erected said water tank, appellant had a property right in such undertaking and a right to pursue its lawful business in erecting said gas works.

To prevent the appellant from finishing its said contract, to deprive it of the property which it already had therein, and of the benefits of the contract, and the right to the profit to be derived therefrom, without any hearing or without making any compensation therefor, was depriving it of its property

without due process of law within the meaning of the Fourteenth Amendment of the Constitution of the United States. For the City of Los Angeles to make it absolutely impossible to perform the contract, in fact to prohibit the performance of the contract; to deprive appellant of the right to carry on its business in which it was at the time of the passage of the ordinance lawfully engaged, was to take away from the plaintiff one of the incidents of its property, the right to use it, and the right to pursue an honest business, which business itself was at the time of the passage of the ordinance lawful—and so recognized as lawful by the laws of the State of California—and was depriving appellant of property rights protected by the provisions of the Federal Constitution.

To impose proper restrictions or regulations upon property in a proper exercise of the police power is one thing; but to absolutely prevent the use of property for the purpose for which the appellant had purchased it and to prevent the appellant from carrying on its lawful business in connection therewith, was to deprive appellant of its property without due process of law.

The case of the *City of Chicago v. Netcher,* 183 Ill. 104, 55 N.E. Rep. 707, was an action by the City of Chicago against Charles Netcher for a violation of an ordinance which was directed against the class of stores known as "department stores" or general stores for the sale of different kinds of merchandise divided into separate departments in the City of Chicago. In

reference to the ordinance involved in this case, the Supreme Court of Illinois said:

"The ordinance is also an attempted interference by the city with rights guaranteed to the defendant by the constitutions of the United States and of this state. The questions involved are not new. They have been before this and other courts throughout this country in numerous cases, and the rights of the citizen, as against such interference, have been frequently defined, and uniformly upheld. These constitutions insure to every person liberty, and the protection of his property rights, and provide that he shall not be deprived of life, liberty or property without due process of law. The liberty of the citizen includes the right to acquire property, to own and use it, to buy and sell it. It is a necessary incident to the ownership of property that the owner shall have a right to sell or barter it, and this right is protected by the constitutions as such an incident of ownership. When an owner is deprived of the right to expose for sale and sell his property, he is deprived of property, within the meaning of the constitution, by taking away one of the incidents of ownership. Liberty includes the right to pursue such honest calling or avocation as the citizen may choose, subject only to such restrictions as may be necessary for the protection of the public health, morals, safety, and welfare. The state, for the purpose of public protection, may, in the proper exercise of the police power, impose restrictions and regulations; but the right to acquire and dispose of property is subject only to that power. The individual may pursue, without let or hindrance from any one, all such callings or pursuits as are innocent in themselves, and not injurious to the public. These are fundamental rights of every person living under this government. The legislature can neither, by an enactment of its own, interfere with such rights, nor authorize a municipal corporation to do so. *Frorer v. People,* 141 Ill. 171, 31 N. E. 395; *Ramsey v. People,* 142 Ill. 380, 32 N. E. 364; *Braceville Coal Co. v. People,* 147 Ill. 66, 35 N. E. 62; Cooley, Const. Lim. * 393."

IV.

Police Powers.

It must be candidly admitted that the obligations of contracts and vested rights are not beyond legislative control, but are subject to certain limitations which the State may lawfully impose in the exercise of its police power; but police power cannot be put forward as an excuse for oppressive and unjust legislation.

Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious; but this power can only be put forward and lawfully resorted to for the purpose of preserving the public health, safety or morals, or in the abatement of public nuisances; and though it may be claimed by the appellee that the ordinance in question in this case is a police regulation, we submit to the judgment of this court that this ordinance and the object for which it was adopted was not a proper exercise of the police power.

The question whether or not the ordinance of March 3rd, 1902, is a proper police regulation deserves the gravest consideration of this Court.

It is our contention that this ordinance is not a police regulation, and does not come within the power of the City of Los Angeles in reference to police regulations; that it is not within the police regulations as defined and recognized and not within the sovereign police power of the State itself, and we there-

fore contend that it impairs the obligation of the contract which the appellant was bound to fulfill and was in violation of the vested rights acquired by appellant and its employer, Caroline W. Dobbins.

In discussing this question as to the police power of the State, where vested rights are involved, and as to the duty and power of this Court, we desire to call the attention of this Court to the expression that is used by the Supreme Court of the State of New York in the case of *People v. Budd*, 117 N. Y. 1, where the court said:

"The generality of terms employed by jurists and publicists in defining the [police] power, while they show its breadth and the universality of its presence, nevertheless leaves its boundaries and limitations indefinite, and imposes upon the court the necessity, as each case arises, to determine whether the particular statute falls within or outside of its appropriate limits."

In *Lawton v. Steele*, 152 U. S. 133, Mr. Justice Brown, rendering the opinion of this Court, says:

"It [the police power] is universally conceded to include everything essential to public safety, health and morals, and to justify destruction or abatement by summary proceedings of whatever may be regarded as public nuisances * * * To justify the State in thus interposing its authority in behalf of the public it must appear, *first*, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, *second*, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under guise of protecting public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination of what is a

proper exercise of the police power is not final or conclusive, but is subject to the supervision of the courts."

So it is for this Court to determine question now presented whether this particular ordinance belongs or does not belong within the police power and whether it interferes with the vested rights we have acquired.

This ordinance is not within the appropriate limits of the police power as we understand it. We understand the police power, as defined, to have reference to *those things which affect the public health, the public safety, the public comfort or the public morals.* If they do not affect those things they are arbitrary exercises of the legislative power and if they affect vested rights the courts will not sustain them.

In the case of *Noel v. People,* 187 Ill. 587; 58 N. E. Rep. 616, the Supreme Court of Illinois said:

"Undoubtedly the legislature has the right, under the police power, to pass enactments for the benefit and promotion of the public health. But it is well settled that the exercise of the police power must be limited to such measures as are designed to promote the public health, the public morals, the public safety, or the public welfare. *City of Chicago v. Netcher,* 183 Ill., 104, 55 N. E. 707. When it can be seen from the provisions of a statute that it has no tendency to promote the public health, safety, morals, comfort, or welfare, the courts are authorized to declare it invalid."

In that case the Supreme Court of Illinois quoted with approval from the case of *State v. Donaldson,* 41 Minn. 74, 42 N. W. 781, where the Supreme Court of Minnesota said:

"In the absence of some other regulations, a statute merely limiting the sale of patent regulations, a statute merely limiting the sale of patent medicines to a particular class would not and could

not have any natural or reasonable tendency to protect the public. Such a law would not go far enough to amount to a police regulation. It would be merely giving a certain class of men a monopoly of the trade. This is not within the police power of this State. * * * A law enacted in the exercise of the police power must in fact be a police law. If it be a law for the protection of public health, it must be a health law having some relation to public health. * * * If it is apparent on the face of the act that its provisions, from the very nature, cannot and will not conduce to any legitimate police purpose, it is the right as well as the duty of the court to pronounce it invalid, as in excess of legislative power, and an arbitrary and unwarranted interference with the right of the citizen to pursue any lawful occupation."

In *Chicago v. Netcher, supra,* the Supreme Court of Illinois further said:

"In order to sustain legislative interference with the business of the citizen by virtue of the police power, it is necessary that the act should have some reasonable relation to the subjects included in such power. If it is claimed that the statute or ordinance is referable to the police power, the court must be able to see that it tends, in some degree, towards the prevention of offenses, or the preservation of the public health, morals, safety, or welfare. It must be apparent that some such end is the one actually intended, and that there is some connection between the provisions of the law and such purpose. If it is manifest that the statute or ordinance has no such object, but, under the guise of a police regulation, is an invasion of the property rights of the individual, it is the duty of the court to declare it void. *Braceville Coal Co. v. People, supra; Eden v. People,* 161 Ill. 296, 43 N. E. 1108; Cooley, Const. Lim. 577. It is not claimed in the argument for the city that the selling of the different kinds of merchandise mentioned in the ordinance in the same building tends in any way to affect the safety, health, morals, comfort, or welfare of the public. No attempt is made to suggest any

grounds upon which the ordinance can be justified as an exercise of the police power of the city or the state. It certainly cannot be contended that there is anything in the character of dry goods, clothing, jewelry, and drugs which renders it dangerous to the public, or inimical to the general welfare, that they should be sold in the same building with provisions. General stores have always dealt in all kinds of merchandise, and no one has ever imagined that the comfort, safety, or welfare of the public was in any manner or to any extent injured or prejudiced by them. Public health and public comfort are in no way affected by selling the different kinds of merchandise enumerated in different departments of the same building, and would not be if the same clerk should sell them, nor would the public welfare or comfort be increased by compelling a customer to buy one kind of merchandise in one store and another in some other store. In *Meyers v. Baker,* 120 Ill., 567, 12 N. E. 79, the act prohibiting the establishment of a tent, booth, or place of vending provisions or refreshments within a certain distance of a camp meeting was sustained as a police regulation tending to prevent disturbance or disorderly conduct. But this ordinance has no such purpose. It is plain that its object is not to protect the health, morals, or safety of the public, or to accomplish any object falling within the police power. It is a mere attempt to deny a property right to a particular class in the community, where all other members of the community are left to enjoy it. It is immaterial whether such a denial is in a statute or in an ordinance passed by virtue of a statute. It is equally invalid in either case."

The police power of the State of California is a sovereign power. It does not exist by virtue of the grant of the constitution of that State. The provisions of the constitution of that State in reference thereto are not a grant of the police power. The police power, like the power of eminent domain and the power of taxation is a sovereign power within the people of the

State prior to the adoption of the constitution. Sec. 11 of Art. XI of the constitution of the State of California is not, therefore, a grant of police power but it is an extension to the counties, cities, towns or townships of the State of the right to exercise the powers that are inherent in the legislature as the representative of the people. That is the scope of Section 11 of Article XI of the constitution of that State. It is therein provided "that any county, city, town or township may make or enforce within its limits all such local police, sanitary or other regulations as are not in conflict with general laws." The provisions of this constitution are simply a grant to the municipal authorities to exercise a power which is inherent in the State. It does not enlarge upon that power or give the municipality any power which the legislature itself did not have; namely a right to exercise the police power by virtue of its sovereignty; and the police power is not enlarged by virtue of the terms of the provisions of this constitution. It is as it always was, the right of the people to legislate in reference to those things which promote the public health, the public comfort, the public safety or the public morals.

It was not intended by either the constitution of that state, or any statute passed prior to its adoption, to vest in the City of Los Angeles police powers in excess of those which states or municipalities exercised prior to the adoption of the constitution of the state of California, and it cannot be successfully asserted that the City of Los Angeles has today any police power

which is superior to and more far-reaching than that which the common law recognizes as inherent in states and as possessed by municipalities to whom that police power upon certain subjects had been delegated.

Ex parte Campbell, 74 Cal. 20;

Ex parte Roach, 104 Cal. 272.

The following authorities clearly define the police power and are applicable to the case at bar, and distinguish the case at bar from the authorities relied upon by the defendant in the court below.

The case of the *City of Indianapolis v. Consumers' Gas Trust Company*, 39 N. E. Rep. (Ind.) 433, was prosecuted by the city of Indianapolis against the Consumer's Gas Trust Company for the violation of a city ordinance. By the general ordinance passed by the city of Indianapolis on the 27th day of June, 1887, it was provided that any corporation could maintain, lay or extend and maintain mains, pipes, etc., through the streets, etc., of said city, and may take up for the purpose of altering, changing or repairing the same, as the necessities of the case may require, for the purpose of supplying such city and its inhabitants with natural gas under certain restrictions and conditions prescribed in the ordinance. Afterwards, in 1890, the City Council of the city of Indianapolis passed an ordinance making it unlawful for any person, firm or corporation to cut or dig into any street or alley that may theretofore have been paved with brick, or any form of block, macadam or asphaltic pavement, until such person, firm or corporation, for whose benefit such proposed opening was to be made, should have first secured the consent

of the common council and board of aldermen so to do, and should have filed in the office of the city a bond conditioned to protect the city from all liability on account of the proposed opening of said street. For the alleged violation of this city ordinance the prosecutions were commenced against the defendant and it was contended that the defendant having complied in all respects with the provisions of the ordinance of June 1887, that the ordinance of 1890 was invalid in that it impaired the obligation of the legislative contract between appellant and appellee by virtue of the ordinance of 1887. It was contended by the city, that notwithstanding the passage of the first ordinance and the acceptance thereof by the Gas Company constituted a contract, yet it was subject to the exercise of the police power upon the part of the city, which power could not be bargained away, and that the ordinance of 1890 was a valid exercise of that power. In reference to this ordinance and this question, the Supreme Court of Indiana, page 436, said:

"There was no compulsion on the part of the appellant to grant the privilege to use its streets to any particular company. It was within its discretion to give or not to give its consent, and it had the right to withhold it from all gas companies. *Gas & Min. Co. v. Town of Elwood*, 114 Ind. 332, 16 N. E. 624. It was not limited alone to the granting of the franchise, but it had the right to prescribe and impose terms and conditions. Dill Mun. Corp. Sec. 706; 2 Wood, Ry. Law, p. 986. Elliott Roads, & S., p. 465. When these terms and conditions proposed by appellant were accepted by the appellee, and complied with, it became a binding contract. *Western P. & S. Co. v. Citizens' St. R. Co.*, 128 Ind. 531, 26 N. E. 188, and 28 N. E. 88. But the appellant contends that such grants are but the exer-

cise of police power, and may be changed or repealed by the granting power. It is true, that, in grants to persons or corporations to supply gas and the like to the inhabitants of towns or cities, the municipality does not part with or bargain away its right, under the police power, to protect the public health, the public morals, and public safety, as the one or the other may be affected by the exercise of the franchise by the grantee. *New Orleans Gaslight Co. v. Louisiana etc., Manuf'g. Co.*, 115 U. S. 650, Beach Pub. Corp. Secs. 713, 990, 1229, 1230. In the case of *City of Indianapolis v. Indianapolis Gaslight & Coke Co., supra*, it was contended, upon the part of the city, that the contract in controversy was a restriction upon the legislative power to regulate the lighting of the streets. But this court, in that case, draw the distinction between the legislative and contractual powers of municipal bodies as follows: 'These two powers need not be confounded. The exercise of the legislative power requires the consent of no person, except those who legislate, while it is impossible to make a contract without the consent of another or others. We think, therefore, that, when the city of Indianapolis made the contract in question with the gaslight company, it made it in the exercise of its power to contract, and not in the exercise of its powers to legislate, although the power to make the contract was authorized by an ordinance; and, having the power to make a contract touching the subject-matter, it had the right to make it according to its own discretion as to its prudence or good policy, within the limits of its franchise. Nor can we see that the contract in the least restricts the legislative powers of the city, except that, as the sanctity of the contract is shielded by the Constitution of the United States, it cannot, in the exercise of its legislative power, impair its validity; for it would be a solecism to hold that a municipal corporation can impair the validity of a contract, when the state which created the corporation, by its most solemn acts, has no such power.' See, also *Insurance Co. v. Debolt*, 16 How. 416. The appellant cites *Stone v. Mississippi*, 101 U. S. 814, in the support of its contention that the grant to appellee to use the streets was the exercise of

its police power; but this case decides only that the abolition of a lottery was clearly within this power, as lotteries are contrary to public morals. The case has no bearing upon the rules which the appellant insists ought to be applied in the case now before us. Chief Justice Waite, in this case, speaking for the court, on page 818 of the opinion, said: 'Many attempts have been made in this court and elsewhere to define the police power, but never with entire success. It is always easier to determine whether a particular case comes within the general scope of the power, than to give an abstract definition of the power itself, which will be in all respects accurate. No one, however, denies that it extends to all matters affecting the public health or the public morals.' This, we think enunciates the true rule. We cannot agree, and hold with the appellant that the second ordinance upon which this prosecution is based should be regarded as an exercise of the police power under discussion, so as to bind the appellee, under the facts alleged in its answer, and thereby compel it to comply with its terms and conditions in the exercise of the rights granted to it by the first ordinance."

The case of *Barthet v. City of New Orleans*, 24 Fed. Rep. 564, is also directly in point, and in this case the City of New Orleans attempted to do what the City of Los Angeles is now attempting to do, and having once established a district, they attempted to restrict it. It appeared in this case that by several ordinances adopted the City of New Orleans designated the place at which the slaughtering of cattle might be carried on, and prescribed in detail the regulations under which said business could be conducted. The complainant, a citizen of France, whose trade and business was the slaughtering of cattle for food, desiring and intending to engage in such business in New Orleans, leased, with the privilege of buying, two squares of land situate within the limits prescribed by city ordinance, and pro-

ceeded to repair such buildings and construct on said ground other buildings and improvements suitable for the trade in which he is engaged, investing in said improvements a considerable sum of money. Subsequently, on May 19th, an ordinance was passed by the Council which is styled "An ordinance amending ordinance 7,336, as passed September 13, 1881, designating the places for slaughtering animals intended for food under article 248 of the constitution." The original ordinance provided that "It shall be lawful for any person or corporation to keep and maintain slaughter houses, etc., within certain limits, under certain regulations." The amendment mentioned makes it unlawful to keep and maintain slaughter houses within said limits prescribed in the original ordinance and under said regulation "except permission be granted by the Council of the City of New Orleans." The court said:

"It appears that defendant corporation intends actively to enforce, or attempt to enforce, as against Barthet, the amended ordinance; that it is about to obstruct, hinder, and prevent him from carrying on his legal business in the limits already laid out in pursuance of article 248.

"The complainant, alleging that, acting on the good faith of said articles and ordinances, he has acquired vested rights, and that the ordinance of May 19th is unconstitutional, brings a bill for injunction to enjoin and restrain the defendant from interfering in any manner with him in carrying on his business. * * * * *

"If the amendment of May 19th becomes operative as a law, the investment made by Barthet, on the faith of the law existing when he erected his buildings, will be lost or greatly diminished in value and his privilege, which is of more value, may be wholly destroyed by refusal of the city. It is urged in argument that the

corporation is a legislative body, endowed with police powers, to be exercised with absolute discretion; that this court has no power to control or limit its action in directing when, and upon what particular lot in the territory laid out and defined by the city, Barthet, or any other person following the same business, may locate and carry on his business of slaughtering animals for food. The proposition of the city attorney, in view of the many cases that have been decided by the State and Federal courts, in which just such assumptions of power have been contended for and denied to municipal authorities, need not now be considered, further than to say that the court does not think the proposition maintainable under the law and facts found on the hearing of this bill. * * *

"Our opinion will be better understood when we say that the city authorities have no power, legislative, judicial, or administrative, to pass the ordinance complained of; because the power, by whatever name it may be called, delegated to the city in articles 248, 258, as far as Barthet is now concerned, was exhausted when the city officials laid out the limits in which it was declared lawful to slaughter animals for food."

The case of the *City of Buffalo v. Chadeayne*, (N.Y.) 31 N. E. Rep. 443, is a case where the City of Buffalo, having prescribed certain fire limits and having given permit to a citizen of Buffalo to erect seven frame buildings within that district, subsequently after he had his foundations laid, changed the district and prosecuted him for a violation of the ordinance by which they attempted to restrict the district. In that respect it is similar to the case at bar. The court said:

"This action was brought to recover a penalty for an alleged violation of an ordinance pertaining to the erection of wooden buildings within the prescribed fire limits of the city of Buffalo. On the 11th day of July, 1887, the Common Council of the city passed a resolution granting permission to the defendant to erect seven frame wooden houses upon premises owned by him, and

specifically described. The resolution was duly approved by the mayor, and thereupon, the defendant entered into a contract for the materials with which to make such structures. He made excavations for the cellars, and laid a portion of the walls prior to the 1st day of August. On that day the Common Council, without notice to him, passed a resolution which it is claimed rescinds the former resolution. The last resolution was approved by the mayor on the 15th day of August, and on the 10th day of November a copy thereof was served upon the defendant. Oral notice was given to him of the passage of the resolution on the 2nd day of August, prior to its approval by the mayor. He, however, continued the construction of his buildings, and at the time the notice, with a copy of the resolution, was served upon him in November, several of the buildings had their roofs on, and the rest were in process of construction. This action was then brought for the penalty provided for in the ordinance, and resulted in the judgment which is the subject of this review. The charter of the plaintiff [chapter 519, Laws 1870] provides that 'the city shall have power by its Common Council from time to time to enact ordinances, * * * to prescribe the limits within which wooden buildings shall be erected, and the manner in and material of which all buildings shall be constructed within such limits. Every building erected or placed contrary to any ordinance passed under the last above provision shall be deemed a common nuisance, and may be abated as such.' Title 3, Sec. 8, Subd. 4. Pursuant to this provision, the Common Council enacted ordinances, among which we find the following: 'No person shall, without permission of the Common Council, erect, place, or move any building, constructed in whole or in part of wood, within the limits of the city of Buffalo, as defined by Section 2 of Title 1 of the charter of said city.' Ord. c. 5, Sec. 20. The defendant's buildings are within the fire limits, as prescribed by the ordinance. He therefore had no right to construct them without the permission of the Common Council. Such permission, as we have seen, was granted on the 11th day of July, 1887, and thereby he acquired the right to

proceed with the construction of his buildings, and to possess and enjoy the comforts they might afford. As soon as he had entered upon the construction of the buildings, and incurred liabilities for the work and material, he had a property interest in them. In this right he was entitled to protection. *People v. O'Brien*, 111 N. Y. 1-62, 18 N. E. Rep. 692; *In re Union El. R. of Brooklyn*, 112 N. Y. 61-75, 19 N. E. Rep. 664; *People v. Otis*, 90 N. Y. 48-52; *Stuart v. Palmer*, 74 N. Y. 183; *Detroit v. Plank-Road Co.*, 43 Mich. 140, 5 N. W. Rep. 275.

"It is claimed by the appellant that a municipal board may reconsider its action at any time before private vested rights have resulted from such action, and that the defendant could not acquire vested rights as against the police power of the state or municipality. For the purposes of this case we may concede these propositions. As to the first, it appears, as we have seen, that the defendant had entered upon the construction of his buildings, had made contracts, and incurred liabilities thereon, before the Common Council attempted to reconsider its action, giving him a permit to construct of wood. A private property right had, therefore vested in him prior to the rescission of the resolution. As to the second, his right may be subject to the police power of the State, but the difficulty is that the State has not seen fit to deprive him of such right by the exercise of such power, nor has it delegated the same to the municipality. The State has given to the municipality power to prescribe the limits in which wooden buildings shall not be erected. This pertains to the future, and not to existing wooden buildings. The ordinance to which we have referred provides that no person shall, without permission of the Common Council, erect any building in whole or in part of wood, within certain limits. This has reference to buildings that shall be erected in the future, and not existing buildings, or to those erected with the permission of the Common Council. So that neither the charter nor the ordinance authorizes it to interfere with existing buildings, or those constructed with its permission. There is consequently no power

given to the Common Council to deprive the defendant of any vested property rights in the buildings. If the Common Council could interfere and rescind its permit after a building is partially constructed, it could also rescind after it was fully completed. It would consequently follow that every person who in the past has constructed wooden buildings with the permission of the Common Council is now liable to have his permit revoked, and his buildings declared a nuisance, and abated as such. The restrictions authorized by the provisions of the charter under consideration are for the purpose of the prevention and extinguishment of fires. They have no reference to buildings that may become a nuisance by reason of their becoming dangerous to the public. Having in view the purpose for which the provision was enacted, it seems to us clear that it was not intended to give to the Common Council the power to deprive persons of their buildings which had previously been erected, or of those which should be thereafter erected, in whole or in part, with the permission of the Common Council; and that its power is limited to the prevention of the erection of wooden buildings in the future without its permit."

This is the latest case in the Court of Appeals of New York having reference to this subject.

It is of vital importance in arriving at a conclusion in this case to bear in mind that the police power has only to do with those things that affect the public health, the public morals, the public comfort or the public safety. This is demonstrated and insisted upon by this Court as the real criterion of all these questions as to the exercise of the police powers.

The cases relied upon by counsel for the defendant in the court below, as for instance the case of *Beer Company v. Massachusetts*, 97 U. S. 25, a beer case; *Fertilizing Company v. Hyde Park*, 97 U. S. 659, a

fertilizing case; and *Stone v. Mississippi,* 101 U. S. 814, a lottery case, are all well recognized as being within the police power. This case of the *Hyde Park Fertilizing Company* is one of the strongest cases reported, where permission was given by a charter granted by the legislature of the State of Illinois, to the fertilizing company to erect fertilizing works within the town of Hyde Park. Subsequently, the growth of the city of Chicago was such that these works became a nuisance and the city authorities of the town of Hyde Park passed an ordinance absolutely prohibiting carrying on the manufacturing of fertilizers and rendering business within the town of Hyde Park, although this work had been carried on by this company for ten years by virtue of the charter of the legislature, and they had expended upon their works upwards of $200,000.

This Court sustained the ordinance passed by the town authorities of the town of Hyde Park because it said it came directly within the definition of the police power in that it affected the public health and the public comfort.

This case is an illustration of a well recognized principle that the great police power is not bound to recognize a condition or state of things existing today as beyond change at its hands in time to come, when changed conditions occur and public welfare demands alteration and increased exercise of police power in restraint of privileges once established. A business once harmless and lawful under an altered condition of things may later on become hurtful to the public, and

in that event may be restrained in its transactions. That is not the case at bar.

Take, however, the case of *New Orleans Gas Company v. Louisiana Light Company,* 115 U. S. 650, and we come to a different line of authorities and we find there the distinction well pointed out by Mr. Justice Harlan, who rendered the opinion of this Court, and which is the distinction which should always be borne in mind in the determination of the question whether or not an ordinance is a police regulation.

Is the object sought to be attained the abatement and destruction of that which affects the public health, the public safety or the public morals? If it does not, it is not within the police power of the State; and if it affects vested rights, it is the taking of private property without due process of law. If it interferes with the lawful occupation of a citizen, it interferes with his rights, privileges and immunities.

Mr. Justice Harlan for this Court makes this distinction in the case of *New Orleans Gas Company v. Louisiana Light Company, supra,* and this Conrt has adhered to the doctrine laid down in that case; and in the case of *Walla Walla v. Walla Walla Water Company,* 172 U. S. 1, 15, has reiterated the same doctrine.

Mr. Justice Harlan in the case of *New Orleans Gas Co. v. Louisiana Light Co.,* in delivering the opinion of this Court, used this language:

"The principle upon which the decisions in *Beer Co. v. Massachusetts,* (97 U. S. 25), *Fertilizing Co. v. Hyde Park,* (97 U. S.

659), *Stone v. Mississippi* (101 U. S. 814), and *Butchers' Union Co. v. Crescent City Live-Stock Landing Co.* (111 U. S. 746), rest, is, that one legislature cannot so limit the discretion of its successors, that they may not enact such laws as are necessary to protect the public health, or the public morals. That principle, it may be observed, was announced with reference to particular kinds of private business which, in whatever manner conducted, were detrimental to the public health or the public morals. It is fairly the result of those cases, that statutory authority given by the State to corporations or individuals to engage in a particular private business attended by such results, while it protects them for the time against public prosecution, does not constitute a contract preventing the withdrawal of such authority, or the granting of it to others.

"The present case involves no such considerations. We have seen the manufacture of gas, and its distribution for public and private use by means of pipes laid, under legislative authority, in the streets and ways of a city, is not an ordinary business in which everyone may engage, but is a franchise belonging to the government, to be granted, for the accomplishment of public objects, to whomsoever, and upon what terms, it pleases. It is a business of a public nature, and meets a public necessity for which the State may make provision. It is one which, so far from affecting the public injuriously, has become one of the most important agencies of civilization, for the promotion of public convenience and the public safety."

We strenuously contend that in the erection of these gas works that there is nothing unlawful and that when we come to maintain these works, if we maintain a nuisance the city authorities have a right under changed conditions to regulate it and make us cease maintaining a nuisance, or if we charge for gas more than we ought to, they have a right to regulate that; but they have no right to absolutely drive us out of business and say we shall not erect a building in which we are going

to manufacture gas. The erection of gas works does not constitute a public offense in any respect whatsoever; nor does their maintenance, unless it is judicially determined it is a nuisance.

Continuing from the *New Orleans Gas Company's* case this Court says:

"Whatever therefore in the manufacture or distribution of gas in the city of New Orleans proves to be injurious to the public health, the public comfort, or the public safety, may, notwithstanding the exclusive grant to plaintiff, be prohibited by legislation, or by municipal ordinance passed under legislative authority. It cannot be said with propriety, that to sustain that grant is to obstruct the State in the exercise of her power to provide for the public protection, health and safety. The article in the State Constitution of 1879 in relation to monopolies is not in any legal sense an exercise of the police power for the preservation of the public health, or the promotion of the public safety; for the exclusiveness of a grant has no relation whatever to the public health or to the public safety. These considerations depend upon the nature of the business or duty to which the grant relates, and not at all upon the inquiry whether a franchise is exercised by one rather than by many."

And so we insist that the facts that distinguish these cases whether or not they are within the police power is this: Do they affect the public health, the public safety, the public comfort or the public morals? If they do not, they are not within the proper exercise of the police power and the police regulation.

In the case of *Walla Walla City v. Walla Walla Water Co.*, 172 U. S. 1, 15, this Court said:

"The argument that the contract is void as an attempt to barter away the legislative power of the City Council rests upon the assumption that contracts for supplying a city with water are within the police power

of the city, and may be controlled, managed or abrogated at the pleasure of the council. This court has doubtless held that the police power is one which remains constantly under the control of the legislative authority, and that a City Council can neither bind itself nor its successors, to contracts prejudicial to the peace, good order, health or morals of its inhabitants; but it is to cases of this class that these rulings have been confined. If a contract be objectionable in itself upon these grounds, or if it becomes so in its execution, the municipality may, in the exercise of its police power, regulate the manner in which it may be carried out, or, may abrogate it entirely, upon the principles that it cannot bind itself to any course of action which shall prove deleterious to the health or morals of its inhabitants. In such case an appeal to the contract clause of the constitution is ineffectual. Thus in *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, an act of the General Assembly of Illinois authorized the Fertilizing Company to establish and maintain for fifty years certain chemical works for the purpose of converting dead animals into agricultural fertilizers, and to maintain depots in Chicago for the purpose of receiving and carrying out of the city dead animals and other animal matter which it might own or buy. Subsequently, the charter of the village of Hyde Park was revised, and power given it to define or abate nuisances injurious to the public health. It was held that under this power the village had the right to prohibit the carrying of dead animals, or offensive matter, through the streets; that the charter of the company was a sufficient license until revoked, but was not a contract guaranteeing that the company might continue to carry on a business which had become a nuisance by the growth of population around its works, or that it should be exempt for fifty years from an exercise of the police power of the State, citing *Coates v. Mayor &c. of New York*, 7 Cowen, 585.

"Substantially, the same ruling was made in *Butchers Union Co.* v. *Crescent City &c. Co.* 111 U. S. 746, wherein an act of the legislature of Louisiana, granting exclusive privileges for maintaining slaugh-

ter houses, was held to be subject to subsequent ordinances of the city of New Orleans opening to general competition the right to build slaughter houses.

"The same principle has been applied to charters for the maintenance of lotteries which, upon grounds of public policy, have been held to be mere licenses and subject to abrogation in the exercise of the police power of the government; *Boyd v. Alabama*, 94 U. S. 645; *Stone v. Mississippi*, 101 U. S. 814; *Douglas v. Kentucky*, 168 U. S. 488; as well as to laws regulating the liquor traffic, *Beer Co. v. Massachusetts*, 97 U. S. 25; *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 657; and even laws regulating the inspection of coal oil; *United States v. De Witt*, 9 Wall. 41; *Patterson v. Kentucky*, 97 U. S. 501. In the latter case it was held that a person holding a patent under the laws of the United States for an invention was not protected by such patent in selling oil condemned by a state inspector as unsafe for illuminating purposes.

"Under this power and the analogous power of taxation we should have no doubt that the City Council might take such measures as were necessary or prudent to secure the purity of the water furnished under the contract of the company, and the payment of its just contributions to the public burdens, and the observance of its own ordinances respecting the manner in which the pipes and mains of the company should be laid through the streets of the city. *New York v. Squire*, 145 U. S. 175; *St. Louis v. Western Union Tel. Co.*, 148 U. S. 92; *Laclede Gas Light Co. v. Murphy*, 170 U. S. 78. But where a contract for a supply of water is innocuous in itself and is carried out with due regard to the good order of the city and the health of its inhabitants, the aid of the police power cannot be invoked to abrogate or impair it."

In the manufacture of gas there is nothing that will affect the public health or the public safety. It is alleged in the complaint in this case that the gas works in question are being erected upon concrete foundations with a superstructure of brick, steel and iron, of the

best material procurable, and are not combustible and that the same are so firmly and substantially constructed that there can be no danger from explosions, bursting or leakage; that all the machinery now in place therein or to be placed therein is of the most approved pattern, and constructed in accordance with the latest devices and improvements known in the manufacture of gas; that said works can and will be operated and maintained by the said Caroline W. Dobbins, by the use of the said devices and improvements and the said machinery therein contained, so that there will be no leakage or escape of odors, and that the same will not create a nuisance and will not interfere in any way with the health, comfort, safety or welfare of the inhabitants of the said district and territory in which the said gas works are located upon the premises of the said Caroline W. Dobbins, or of any other of the inhabitants of said City of Los Angeles.

The demurrer of the defendant admits the facts thus pleaded in the complaint as true. Until we have had an opportunity of testing this question, the city authorities have no right to interfere and exercise this so-called police power.

It will be for the counsel for appellee to show any case in which the police power has been sustained and allowed to infringe upon vested rights, except in those cases which affect the public health, comfort, safety or welfare, and it will be for them to show that in the nature of the case under a police power a municipal authority has been allowed to restrain the prosecution of any business or enterprise which does

not so infringe upon the public health, public comfort, public welfare or public safety.

It will not be sufficient for them to cite the case of *ex parte Lacey*, 108 Cal. 326, where an ordinance for the establishment of a steam carpet beating machine was sustained, as that was a health ordinance, and the City of Los Angeles cannot pass, under the guise of a health measure, an ordinance that has no relation whatever to the public health; the *Slaughterhouse Cases*, 16 Wallace 36, which were health regulations; the case of *Barbier v. Connolly*, 113 U. S. 27, in reference to the conduct of a public laundry between the hours of ten o'clock at night and six o'clock in the morning, which had reference to a fire regulation; or the case of *Knoxville v. Bird*, 12 Lea 121, which had reference to a fire limits ordinance and affected the public safety; or the case of *Davenport v. City of Richmond*, 81 Virginia, 636, where the ordinance in question was in reference to the keeping and selling of gun powder and affected the public safety; or lottery cases, which affect the public morals. It will be for the learned counsel for the appellee to show any case in which the police power has been allowed to infringe upon vested rights by determining that any enterprise was a nuisance unless the same was a nuisance *per se*.

V.

THIS ORDINANCE IS INVALID BECAUSE IT IS AN ATTEMPT ON THE PART OF THE CITY COUNCIL OF THE CITY OF LOS ANGELES TO DEFINE AND MAKE THAT A NUISANCE WHICH IS NOT A NUISANCE PER SE.

It is our contention that it is not within the power of the City of Los Angeles to adopt any ordinance which will make a nuisance of that which is not a nuisance *per se,* nor could such a declaration make it a nuisance unless it in fact had that character; and that the City Council may not by a mere resolution or motion declare a particular thing a nuisance which has not been theretofore pronounced such by law or so adjudged by judicial determination.

The ordinances in question make it unlawful to erect or maintain any works for the manufacture of gas. In the erection of a gas works there certainly cannot be created a nuisance, and it cannot be determined by the mere passage of an ordinance that the maintenance of a gas works will be a nuisance. The allegations of the bill in this case are neither that in its erection nor maintenance will the gas works not interfere in any way with the health, comfort, safety or welfare of the inhabitants of the district in which it is located, or of the City of Los Angeles.

We contend that this ordinance is too sweeping and too broad and that there is nothing in the law or in the Charter provisions of the City of Los Angeles or in the Constitution of the State of California that au-

thorizes the City of Los Angeles to pass an ordinance which makes that a nuisance which is not a nuisance *per se*; that in the erection of gas works in itself there is no nuisance, and we assert that the courts have decided in many cases that the mere designation of the legislative body that a certain thing is a nuisance which is not a nuisance or which the courts have not determined to be a nuisance does not make it a nuisance, and the legislative act is in that respect always subject to judicial scrutiny and revision.

This Court in the case of *Yates v. Milwaukee*, 10 Wall. 497 said:

"The act of the Wisconsin legislature, approved March 31st, 1854, confers upon the city of Milwaukee the authority to establish dock and wharf lines on the banks of the Milwaukee and Menomonee Rivers, and restrain and prevent encroachments upon said rivers and obstructions thereto, and it is said, by this statute that the summary proceedings for the removal of appellant's wharf are supposed to be authorized. But the mere declaration by the city Council of Milwaukee that a certain structure was an encroachment or obstruction did not make it so, nor could such declaration make it a nuisance unless it in fact had that character. It is a doctrine not to be tolerated in this country, that a municipal corporation, without any general laws either of the city or of the State, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property of the city, at the uncontrolled will of the temporary local authorities. Yet this seems to have been the view taken by counsel who defended this case in the Circuit Court; for that single ordinance of the city, declaring the wharf of Yates a nuisance, and ordering its abatement, is the only evidence in the record

that it is a nuisance or an obstruction to navigation, or in any manner injurious to the public."

The same doctrine is laid down in *C. R. I. & P. R. R. v. Joliet*, 79 Ill. 25, 44; *Everett v. Council Bluffs*, 46 Iowa, 66.

The case of the *City of Denver v. Mullen*, (Colo.) 3 Pacific Rep. 693, was an action brought against the City of Denver for an injunction to restrain it from interfering with the flow of the water in the Platt and Denver ditch. The basis of authority for the action of the city in the premises was made to rest upon certain provisions of the City Charter and certain ordinances, authorizing the city "to make regulations to secure the general health of the inhabitants, to declare what shall be a nuisance, and to prevent and remove the same."

The Supreme Court of Colorado in deciding this case said:

"The proper construction of this language is that the city is clothed with authority to declare by general ordinance what shall constitute a nuisance; that is to say, the city may by such ordinance define, classify, and enact what things or classes of things and under what conditions and circumstances such specified things, are to constitute and be deemed nuisances. For instance, the city might under such authority, declare by ordinance that slaughter- houses within the limits of the city, carcasses of dead animals left lying within the city, goods, boxes, and the like, piled up or remaining for a certain length of time on the sidewalks, or other things injurious to health, or causing obstruction or danger to the public in the use of the streets and sidewalks, should be deemed nuisances; not that the city council may, by a mere resolution or motion, declare any particular thing a nuisance which has not theretofore been pronounced to be such by law, or so adjudged by judicial determination. *Everett v. Coun-*

cil Bluffs, 46 Iowa, 66; *Yates v. Milwaukee,* 10 Wall. 497. * * *

"It is only certain kinds of nuisances that may be removed or abated by the acts of individuals or by the public, such as those which affect the health, or interfere with the safety of property or person, or are tangible obstructions to streets and highways under circumstances presenting an emergency. Such clear cases of nuisances *per se* are well understood, and need not be further noticed here, to distinguish them from the cases before us. If it were admitted that this ditch, by reason of its obstruction to the use of the public streets at the time of the acts complained of, was a nuisance, it must also be admitted that it was not a nuisance *per se.* It was constructed for a necessary, useful, and lawful purpose, was used for such purpose, and therefore in its nature was not a nuisance, as a matter of law. Nor, as a matter of fact, was it a nuisance while it was no hurt, detriment, or offense to the public, or to any private citizen. If, then, it has become a nuisance, it is by reason of a change of circumstances brought about, neither by the ditch itself nor its use."

In *ex parte Sing Lee,* 96 Cal. 354, it appears that the petitioner had been arrested for violating an ordinance making it unlawful to establish, maintain and carry on the business of a public laundry, without first having obtained the permit from the Board of Trustees. Of this ordinance the Supreme Court of California said:

"It is provided by Sec. 11 of Article XI of the constitution of this State, that 'any county, city, town or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws,' and it is argued here, in behalf of the respondent, that the ordinance in question is a police regulation, and therefore one which the town of Chico was authorized to enact by this section of the constitution. The power conferred upon cities and towns by the section just quoted is undoubtedly

a very broad and comprehensive one, and would sustain the enactment of any ordinance having a reasonable tendency to promote the health, the comfort, safety, and welfare of the inhabitants of the municipality, and which would not be in conflict with some general law of the State. But, broad as is this power, the ordinance before us cannot be considered as falling within the limits of its proper exercise.

"The business of conducting a laundry is a lawful occupation, precisely as much so as is that of the carpenter, blacksmith, or merchant, and is not of itself, and irrespective of the manner in which it is conducted, offensive or dangerous to the health of those living within its vicinity. * * *"

The case of the *County of Los Angeles v. The Hollywood Cemetery Association,* 124 Cal. 344, was a bill for an injunction to restrain the defendant from establishing a cemetery upon certain lands, in violation of the ordinance prohibiting the location or establishing of a cemetery within the limits of the County of Los Angeles without permission of the Board of Supervisors. It was held in that case that the ordinance was not a reasonable exercise of the police power and that it was not unlawful to establish a cemetery for the burial of the dead, deriving profit therefrom, as a business enterprise.

Grossman v. Oakland (Oregon) 36 L. R. A. 593.
Stockton Laundry Case, 31 Fed. 680.
In re Hong Wah, 82 Fed. Rep. 623, 624-626.
Ex parte Whitall, 98 Cal. 73.
Wood on Nuisances, Sec. 744.

The Charter of the City of Los Angeles gives the right to designate what are nuisances and to abate them, but we say that a power *to abate* does not include the

power *to prevent*. That the power to abate may some times include the power to prevent must be conceded, but it is only in those cases where a thing sought to be prevented is a nuisance *per se*, and those things which only become a nuisance because of the method of their operation cannot be prevented and stopped under the power simply to abate until it has been demonstrated that they are nuisances.

This point was decided by the Supreme Court of the State of Illinois in the case of *Lakeview v. Letz*, 44 Ill. 81-83, where the court said:

"Various powers for municipal government were conferred upon them, and among others the power 'to abate and remove nuisances, and punish the authors thereof by penalties, fines and imprisonment, and to authorize and direct the summary abatement thereof.' * * * * The act of the legislature authorizing the board of trustees 'to abate and remove nuisances,' gave them no power to pass an ordinance forbidding the establishment of a cemetery. Conceding that the power to 'abate and remove,' should be construed as including the power to prevent, yet this preventive power could only be exercised in reference to those things that are nuisances in themselves, and necessarily so. There are some things which in their nature are nuisances, and which the law recognizes as such. There are others which may or may not be so, their character in this respect depending on circumstances. Now, the town of Lake View is a rural township, containing about eleven sections or square miles of territory. It is therefore impossible to hold, that a cemetery anywhere within the limits of the town, must necessarily be a nuisance, and can be prohibited in advance as such. A cemetery may be so placed as to be injurious to the public health, and therefore a nuisance. It may, on the other hand, be so located and arranged, so planted with trees and flowering shrubs, intersected with drives and walks, and decorated with monumental marbles, as to be not

less beautiful than a public landscape garden, and as free from all reasonable objection. The power to prohibit the establishment of cemeteries except by the authority of the trustees cannot be considered as falling within the power to abate and remove nuisances."

Enough has been said to show that this ordinance of August 26th, 1901, is unreasonable and too sweeping. It is unreasonable and too broad from the fact that it attempts to say that it is unlawful to erect gas works when there is no showing but what the gas works can be maintained in a most satisfactory condition, not only to the public authorities, but to all the surrounding inhabitants.

VI.

THE ORDINANCE ADOPTED BY THE CITY COUNCIL OF THE CITY OF LOS ANGELES ON MARCH 3rd, 1902, IS INVALID AND IS NOT BINDING UPON THE APPELLANT AND IS IN VIOLATION OF THE PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES PROHIBITING ANY STATE FROM MAKING OR ENFORCING ANY LAW WHICH SHALL ABRIDGE THE PRIVILEGES OR IMMUNITIES OF CITIZENS OF THE UNITED STATES.

The ordinance is invalid as being in violation of the rights of appellant to engage in and conduct a lawful business in the city of Los Angeles.

Among the privileges of the citizens of the United States that cannot be abridged, is the right of carrying on a lawful business.

Brandon on the Fourteenth Amendment, p. 65.

In the case of *Corfield v. Coryell*, 4 Wash. C. C. 371, Fed. Cases No. 3230, Washington, Circuit Justice, defining the privileges and immunities of a citizen of the several states, to which citizens of each should be entitled gathers them under general heads, and among others named by him, included the right to take, hold and dispose of property, either real or personal, and the right of the citizen of one state to pass through or reside in any other state for the purpose of trade, agriculture, professional pursuits, or otherwise.

The right to engage in a lawful occupation and business is a privilege of a citizen which is fundamental.

The business of erecting gas works is a lawful occupation.

In the case of *New Orleans Gas Company v. Louisiana Light Company, supra*, this court at page 658 said:

> "It is true, as suggested in argument, that the manufacture and distribution of illuminating gas, by means of pipes or conduits placed, under legislative authority, in the streets of a town or city, is a business of a public character. Under proper management the business contributes very materially to the public convenience, while, in the absence of efficient supervision, it may disturb the comfort and endanger the health and property of the community. It also holds important relations to the public through the facilities furnished, by the lighting of streets with gas, for the detection and prevention of crime. An English historian, contrasting the London of his day with the London of the time when its streets, supplied only with oil lamps, were scenes of nightly robberies, says that 'the adventurers in gas-lights did more for the prevention of crime

than the government had done since the days of Alfred.' Knight, vol. 7, ch. 21; Macaulay, ch. 3." * * *

Ibid p. 669.

"The present case involves no such considerations. We have seen the manufacture of gas, and its distribution for public and private use by means of pipes laid, under legislative authority, in the streets and ways of a city, is not an ordinary business in which every one may engage, but is a franchise belonging to the government, to be granted, for the accomplishment of public objects, to whomsoever, and upon what terms, it pleases. It is a business of a public nature, and meets a public necessity for which the state may make provision. It is one which, *so far from affecting the public injuriously*, has become one of the most important agencies of civilization, for the promotion of the public convenience and the public safety."

The ordinance in question provides, however, that it shall be unlawful for any person, firm or corporation to erect or cause to be erected, maintain or cause to be maintained any works, establishment, manufactory for the manufacture of gas, or any tank, reservoir or other receptacle for the storage of gas within the corporate limits of the City of Los Angeles outside of the limits of the described district. We contend that this is in violation of our rights as guaranteed to us by the Constitution of the State of California and by the Fourteenth Amendment to the Constitution of the United States.

The people of the State of California in their Constitution have wisely made provision by a constitutional grant for a franchise to those engaged in sup-

plying municipalities and the inhabitants thereof with artificial light.

The Consitution of the State of California, Section 19, Article XI, provides that

"In any city where there are no public works owned and contolled by the municipality for supplying the same with water or artificial light, any individual, or any company duly incorporated for such purpose, under and by authority of the laws of this state, shall, under the direction of the Superintendent of Streets, or other officer in control thereof, and under such general regulations as the municipality may prescribe, for damages and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either was gaslight, or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof."

It is in the record of this case that there are no public works owned or controlled by the City of Los Angeles for supplying the same with artificial light.

In reference to this provision of the Constitution c the State of California, the Supreme Court of the State of California, with the advanced spirit that has always inspired that Court to give full effect to each provision of that Constitution, in the very recent opinion rendered in *ex parte Johnston* ——, Cal.——. (69 Pac. Rep. 973, 975) said:

> "In *People v. Stephens,* 62 Cal. 209, the above section was construed by this court, and was held to be a direct grant from the people to the persons therein designated, of the right to lay pipes in the streets of a city for the purposes spe-

cified, without waiting for legislative authority, or being subject to any restrictions from that branch of the government, the court saying, with reference to the privilege of laying pipes in the public streets and thoroughfares of any city: "That privilege is expressly granted by the section of the constitution cited, subject to the direction of the Superintendent of Streets or other officer in control thereof, and under such general regulation as the municipality may prescribe for damages, and indemnity for damage, and upon the condition that the municipal government shall have the right to regulate the charges thereof." The only limitations upon this privilege are those contained in the language in which it is granted, viz., that the work shall be done "under the direction of the Superintendent of Streets, or other officer in control thereof," and "under such general regulations as the municipality may prescribe for damages and indemnity for damages." Upon a compliance with these conditions any individual or company duly incorporated for such purpose is given the privilege "of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gaslight or other illuminating light, or with fresh water for domestic and all other purposes." The municipality may prescribe regulations "for damages and indemnity for damages," but these regulations must be "general," i. e., uniform in their application to all who may desire to exercise the privilege.

The designation of "damages and indemnity for damages" as the subject upon which the municipality may prescribe regulations in regard to laying the pipes is a limitation upon its authority over the matter, and a prohibition from prescribing regulations upon any other subject connected with the exercise of the privilege. When the sovereign authority of the state, either

in its constitution or through its legislature, has created a right and expressed and defined the conditions under which it may be enjoyed, it is not within the province of a municipality where such right is sought to be exercised or enjoyed, to impose additional burdens or terms as a condition to its exercise. The constitution does not authorize the municipality to require a permit as a condition upon which the pipes may be laid in its streets, and its claim of a right to require a permit includes the right to refuse one, and the right to annex one condition to the exercise of the privilege implies the right to annex others which may, at least, impair if not in fact amount to a denial of its exercise. The provision that the work is to be done under the direction of the Superintendent of Streets gives all the protection for the use of the streets that could be obtained under a permit; and, under the provision authorizing the municipality to prescribe regulations for damages and indemnity for damages, the city will be fully protected against any pecuniary loss or detriment. Under the statutes of New Jersey any telephone company was authorized to use the public roads and highways on the line of its route, for the purpose of erecting poles thereon to suspend its wires and other fixtures, upon first obtaining the consent of the owner of the soil, with the proviso that the use of the public streets in any incorporated cities and towns of the state should be subject to such regulations and restrictions as might be imposed by the corporate authorities of said cities and towns. The authorities of the township of Summit passed an ordinance that no wire should be stretched across any public street without the permission of the township committee. In an action to restrain a telephone company from stretching its wires across certain streets of the township the court held that this ordinance was not a "regulation or restriction" under the statute and was therefore, invalid, saying: "A right to prevent the use of

the streets for suspending wires, unless previous consent is obtained, if such right be lawfully conferred, authorizes a refusal to consent at discretion and confers a virtual power of prohibition. The right to the use of the streets has been expressly granted by the legislature, and the power to prohibit or interdict this use so granted cannot be inferred from the declaration in the proviso annexed to the grant, that the use should be subject to such regulations and restrictions as may be imposed. The restrictions intended in such a proviso must be held to be restrictions in the nature of regulations, and not restrictions which shall prohibit the use, or impose new conditions to the power to exercise the franchise." (*Township of Summit vs. N. Y. & N. J. Tel. Co.*, 57 N. J. Equity, 123.) A charter was granted to a gas company by the legislature of Georgia, in which it was authorized to use the streets of the City of Atlanta for laying its pipes and fixtures therein, with the proviso "that the public thoroughfares shall at no time be unnecessarily interrupted or impeded by the laying down or erection thereof, and that said streets shall not be thereby injured, but shall be left in as good state and condition as they were before the laying down of said pipes." The City of Atlanta having passed an ordinance requiring any person who desired to excavate any street for the purpose of laying gas pipes, or for any other purpose, to procure a written permission therefor from the City Engineer, under the penalty of fine and imprisonment, the gas company obtained an injunction against any interference with it on the part of the city authorities in laying the pipes in the streets, and the same was affirmed on appeal, the Supreme Court saying: "The permission of the City of Atlanta was not required to enable the complainant to exercise its franchise. It certainly was not made a condition by its charter. This was not the contract into which it entered with the state, and it would appear anomalous if

a subordinate power could impose terms which the superior did not see proper to impose." (*City of Atlanta vs. The Gate City Gaslight Co.*, 71 Ga. 106.) The same principal has been followed elsewhere. (*Michigan Telephone Company vs. City of Benton Harbor*, 121 Mich. 512; *Wisconsin Telephone Company vs. City of Oshkosh*, 62 Wis. 32; *Appeal of the City of Pittsburg*, 115 Pa. 4; *Borrough of Millvale vs. Evergreen Railway Co.*, 131 Pa. 1; *Harrisburg City R. R. Co. vs. City of Harrisburg*, 149 Pa. 465; *State vs. Flad*, 23 Mo. Ap. 185; *Hodges vs. Telegraph Co.*, 72 Miss. 910.) In *Borrough of Millvale vs. Evergreen Railway Co., supra*, the court said: "The power of the defendant in the exercise of its franchise is altogether independent of the Borrough, and is of just as high and authoritative origin as the right of the Borrough to exist at all. The rights of both are derived from the same source, to-wit: the legislative power of the commonwealth, and the company is not subject to the slightest obligation to go to the Borrough for consent to exercise any part of its corporate franchise. Any other doctrine would subordinate the corporate franchise of the defendant to the will of the Borrough council, and cannot be sanctioned for a moment."

The ordinance in question is not an exercise of the police power, nor can it be justified under that authority. The exercise by a municipality of the police power over its streets is limited to the protection of the public in their use of the street and does not include a limitation upon their use for any legitimate purpose. The highways of a state, including the streets in its cities, are under the control of the people of the state, and in this state the people have declared in their constitution that the streets of a city may be used for laying pipes therein for supplying its inhabitants with gaslight. Under the provision that the work shall be done "under the direction of the Superintendent of Streets"

ample protection is afforded to the inhabitants of the city against any unnecssary incroachment or hindrance in their use of the streets.

The suggestion on the part of the respondent that it is the purpose of the corporation herein to supply gas through its pipes for other purposes than light, even if founded upon fact, does not deprive it from exercising the right conferred upon it by the constitution, or authorize the municipality to prevent it from enjoying that right. Even though the pipes when laid may be available for other purposes than supplying gaslight, the corporation is not thereby deprived of the right which the constitution has given it to lay its pipes in the streets, nor can it be required as a condition of exercising that right to declare that the gas to be supplied by it shall be used exclusively for illumination, or is to be supplied solely for such use."

We have quoted thus at length from this opinion and far reaching decision of the Supreme Court of California because the full scope and effect of this provision of the Constitution of the State of California is thus given effect by the decision of that Court. But if the City of Los Angeles has within itself a power to prescribe a district in which it shall be unlawful to erect gas works, it has it within its power to so continue to limit that district until it shall say that within the City of Los Angeles there shall be no works erected or maintained for the manufacture of gas, and thus in effect nullify the grant given by the Constitution of the State of California that a person should have the right to use the streets for supplying gas, by destroying the implied right that follows therefrom to manufacture gas for the purpose of supplying the inhabitants of the municipality with the same.

If the City of Los Angeles has the power by thus prescribing the limits of a district in which no works shall be erected for the manufacture of gas, it must follow that other municipal corporations within the County of Los Angeles can do likewise, and also the Board of Supervisors, and thus make it impossible for any person to erect gas works within the County of Los Angeles, notwithstanding these provisions of the constitution of the State of California in reference to the use of the streets for the purpose of laying pipes therein. This cannot be done.

As was said in the case of *ex parte Johnston, supra,* "When the sovereign authority of a state either in its constitution or through its legislature has created a right, and expressed and defined the conditions under which it may be enjoyed, it is not within the province of a municipality where such right is sought to be exercised or enjoyed to impose additional burdens as a condition to its exercise * * * and the right to annex one condition to the exercise of the privilege implies a right to annex others which may at least impair, if not in fact amount to a denial of its exercise." The right to make restrictions must be held to be restrictions in the nature of regulations and not restrictions which shall prohibit the use or impose new conditions to the power to exercise the right.

It would be useless to have the right to lay pipes in the street without the power to erect works for the manufacture of gas with which, through such pipes, to supply the inhabitants of the city. The use of the streets would only be an exercise of a part of a corporate franchise and as was said in the case of *Millvale vs. Evergreen Railroad Company, supra,* "Any other doctrine would subordinate the corporate

franchise of the defendant to the will of the borrough council, and cannot be sanctioned for a moment."

The use of the streets is but an incident to the right to manufacture and distribute gas, and it cannot be said that the incident shall be greater than the whole. It is only a part of the entire enterprise which must have been contemplated by the framers of the Constitution.

We present this question to the consideration of this Court because we believe that under the provisions of the Constitution of the State of California, Section 19 of Article XI, there is an implied power granted to every person; an implied franchise constitutionally given to every person to erect gas works within cities and to construct and maintain them.

The power of introducing into and supplying the city with gas carries with it the implied power to construct within the city—not in some outlying district which cannot be connected with it—gas works for that purpose. Without this right the provisions of the Constitution as to supplying gas are rendered absolutely nugatory; for as the provision does not apply except to cities or like municipalities the attempt to exclude gas works from such cities destroys the right to supply gas under the constitutional franchise and of using the streets to supply the city and its inhabitants therewith.

This becomes very essential in the further consideration of this case because it has been contended on behalf of appellee that the Act of the Legislature of the State of California, approved April 4th, 1870, concerning gas companies, and which was adopted

prior to the adoption of the present constitution of that state is still in force. That act gives the corporate authorities of every city and town in the state of California power to "grant to any gas company the privilege of laying down pipes in the streets or alleys of such towns and cities * * * and supplying gas for the lighting of streets and buildings thereon." By section four, it was provided that the authorities of such town should attach "to every license or contract such conditions as will be for the benefit of the public and may secure their enforcement by any orders or ordinances which they may deem necessary. They may also control the location and construction of works so that they may be erected in suitable localities to give the least discomfort or annoyance to the public."

Statutes of California 1869-70, p. 815.

It was urged in the court below on behalf of appellee, that this statute is expressly continued in force by Political Code of the State of California, section nineteen, subdivision twenty, as follows:

"Nothing in either of the four codes affects any of the provisions of the following statutes, but such statutes are recognized as continuing in force, notwithstanding the provisions of the Codes, except so far as they have been repealed or affected by subsequent laws: * * * 20. An Act concerning gas companies, approved April 4th, 1870."

It was therefore urged on behalf of appellee that the Act of April 4th, 1870, is applicable to the present case. The Political Code of California was adopted by the legislature of the State of California and approved March 12th, 1872. Section nineteen

of article eleven of the Constitution of the State of California as now in force was ratified by the people of the State of California on the 12th day of February, 1885.

We contend that this Act of April 4th, 1879, is not in full force, for the reason that the Act itself and the Act continuing it in force were adopted for the purpose of giving to individuals and corporations the privilege of supplying a municipality with gas under conditions that might be prescribed by municipal authorities as to the use of the streets and thoroughfares thereof, and that the right to designate the place within said city limits where gas works should be erected was simply a condition annexed to the license; and that by the adoption by the people of the State of California of Section 19, Article XI of the Constitution of that State they by implication repealed the Act of the Legislature of April 4th, 1870, by themselves granting a franchise independent of the consent of the municipality. Under the present constitution the necessity of the provisions of that act as to securing the franchise from the municipality no longer exist, and the right of the municipality to impose as a condition of the grant the determination of the location of gas works has been abrogated.

By the people of the State of California in their Constitution giving to every individual or corporation organized for that purpose the use of the public streets for the purpose of laying down pipes and conduits therein for the purpose of supplying the municipality with gas, they impliedly repealed previous Acts of the Legislature covering and intended to cover the same

subject. In the Constitution there are no conditions to the grant. The people of the State of California by the adoption of the Constitution chose to take away from the municipality the power to grant or refuse permission to use the public streets with or without any condition whatsoever. [*Ex parte Johnston, supra, People v. Stephens,* 62 Cal. 209.] And the Constitution having given this right to use the public streets and thoroughfares of the municipality, it carried with it the implied right to any individual to erect and maintain gas works at any place within the limits of the municipality which the individual might select; and it is submitted that if the City Council have authority to pass a law limiting the district in which it shall be lawful to erect gas works, that by continuous limitation and exercise of that power they could abrogate and nullify this provision of the Constitution of that state.

The people of the State of California, with a law upon the statute books authorizing the municipality to grant the privilege to individuals to use the public thoroughfares for the purpose of supplying the cities with gas, coupled with the right to control the place of the location of the gas works, chose to take away from the municipality any voice in the matter, and by an absolute constitutional grant gave to every individual or corporation organized for that purpose the right to use the public streets without any condition whatsoever as to the place or places in which the gas works should be erected.

The ordinance is void in that it is unreasonable.

That the ordinance is unreasonable we desire to direct the attention of this court to the sweeping and prohibitory character of the ordinance in its attempted affect upon the right of citizens to make and store gas for useful purposes. The ordinance does not regulate the manner in which gas is to be manufactured, nor does it direct the method in which gas shall be stored, nor limit the amount of gas which shall be made or stored, but under its terms the making and storage of gas, except within the favored boundaries, must be absolutely stopped. The resident in the sparsely settled districts of the city, remote from the gas mains of the Los Angeles Lighting Company, is debarred from illuminating his house by means of any of the numerous gas-making machines which have been safely used for years, and which are now in use in many residences in the City of Los Angeles.

It is also unreasonable in that it describes the district by irregular and arbitrary boundaries for the sole purpose of protecting certain interests that are already established in said boundaries—those operated by the Los Angeles Lighting Company. By an examination of the ordinance of March 3rd, 1902, it will be observed that the boundary lines are drawn without any regard to any natural or geographical lines. While the eastern boundary line is the Los Angeles River, and the south boundary line the city limits of the City of Los Angeles, the western boundary line is an irregular line running through certain streets from the south boundary line of the City of Los Angeles to the

center line of San Fernando street, its principal object being to include and protect the existing works of the Los Angeles Lighting Company, and to leave out the works upon which the appellant was engaged in constructing.

The ordinance is unreasonable and too broad from the fact that it attempts to say that it is unlawful to erect gas works when there is no showing but what the gas works can be maintained in a most satisfactory condition, not only to the authorities, but to all the surrounding inhabitants.

If the ordinance abridges or violates the rights, privileges and immunities of appellant as a citizen of the United States to engage and conduct a lawful business of erecting gas works in the City of Los Angeles; if the ordinance is unreasonable in that it is too broad in its terms and does not regulate, but prohibits, the manufacture and storage of gas within the City of Los Angeles outside of the limits of the confined district described in the ordinance; if the ordinance is unreasonable in the description of the district in which it is sought to limit the right to erect gas works within the City of Los Angeles; if it is unreasonable on any other ground; if it is intended in its operation for the purpose of protecting only certain gas works and the destruction of all others; if it is beyond the power of the City Council to declare that a nuisance which is not a nuisance, then this ordinance, not being a proper police regulation, is invalid, and denies, as well as impairs, the exercise of fundamental rights of the appellant.

Appellant was fulfilling a lawful contract, the obli-

gation of which was impaired by the ordinance in question. Its employer had civil rights which had become vested under a legislative grant and authority, by the action of the City Council of the City of Los Angeles in the passage of the ordinance of August 26th, 1901, and by authority of the Board of Fire Commissioners to whom was delegated authority to grant the permit of November 22nd, 1901. Under this legislative authority appellant and its employer had expended large sums of money in the attempt to erect these gas works.

A city may estop itself by conduct, silence or acquiesence, like other parties to a contract. [*County of Randolph v. Post*, 93 U. S. 502, 513.]

"A grant in its own nature amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant." [*Fletcher v. Peck*, 6 Cranch, 87, 137.]

The city should be estopped by its own grants. Having once established a district and having invited the employer of appellant by virtue thereof to acquire certain property rights therein and having granted to her a permit to erect gas works, the city has no power to change the district in violation of those rights, unless it comes within some legitimate police power under a changed condition of affairs. We have demonstrated to this court that the ordinance of March 3rd, 1902, does not come within what is known as the police power, but on the contrary thereof, it is in violation of vested rights.

VII.

A COURT OF EQUITY HAS POWER TO RESTRAIN BY INJUNCTION A MUNICIPALITY FROM INSTITUTING CRIMINAL PROCEEDINGS WHEN SUCH PROSECUTIONS ARE THREATENED UNDER COLOR OF AN INVALID ORDINANCE FOR THE PURPOSE OF COMPELLING THE RELINQUISHMENT OF A PROPERTY RIGHT.

This question relates to the equity jurisdiction of the court.

We have demonstrated that the prosecutions instituted by the appellee, the City of Los Angeles, were under invalid ordinances and that the appellant had a vested right under its employer, Caroline W. Dobbins, acquired by legislative authority, on which it had expended large sums of money, which the appellee was endeavoring to coerce it into relinquishment of by prosecutions under these invalid ordinances.

It is alleged in the complaint that the appellee conducted these prosecutions under the guise of enforcing the invalid ordinances to which we have called this Court's attention, and that it threatened that if the appellant continued to carry on its work in which it was engaged in building the said gas works and manufactory for the manufacture of gas, that it would arrest all persons employed and engaged in said work until it should have stopped the construction of said gas works and compelled the appellant to desist from the erection thereof.

Under these circumstances, the remedy in equity was available and was the only complete remedy of the appellant.

While, as a general rule, equity will not interfere by injunction to restrain the prosecution of suits for violation of municipal ordinances, there are certain distinctions to be observed in applying this rule.

These distinctions and exceptions to the general rule are best illustrated by the cases to which we desire to call this Court's attention.

In the case of the *Central Trust Company v. Citizens' St. R. Co.*, 80 Fed. Rep. 225, was a motion before the Circuit Court of the United States for a preliminary injunction. The Citizens' Street Railway Company was organized under the general incorporation law of Indiana first enacted in 1861. By agreement with the City of Indianapolis, pursuant to certain ordinances in that behalf accepted by defendant railroad company, the rate of fare to be charged, could be five cents for each passenger, and such was the rate at the time the bill was filled. In March, 1897, the legislature passed an act in reference to the regulation of fares and made it a misdemeanor for any company not to comply therewith.

The question as to the validity of this statute as impairing the contract rights of the defendant railroad company and of the court to entertain the bill to enjoin the district attorney from instituting prosecutions under the act was involved. Showalter, Circuit Judge, said:

"Counsel urge that this bill does not show a cause of action cognizable in chancery against Mr. Wiltsie,

the district attorney, since its purpose is to restrain him from instituting criminal prosecutions under color of the amendment of 1897. *But this complainant is seeking to protect a property right, and it seems to be law that, when such prosecutions are threatened under color of an invalid statute for the purpose of compelling the relinquishment of a property right, the remedy in chancery is available.* *Reagan v. Trust Co.*, 154 U. S. 326, 14 Sup. Ct. 1047, and *Lottery Co. v. Fitzpatrick*, 3 Woods, 222, Fed. Cas., No. 8,541, in each of which apprehended criminal prosecutions were enjoined, are to the point. Even in the case of *Sawyer*, 124 U. S. 200, 8 Sup. Ct. 482, cited by the attorney general, the rule as here stated is plainly recognized; nor do I find it disputed in any case."

The case of *Central Trust Co. v. Citizens' St. Ry. Co. et al., supra,* was again before the Circuit Court upon a motion to dissolve the injunction, and is reported in 82 Fed. Rep. 1, and it was again held by Judge Showalter that if the Act of 1897 was invalid, then Mr. Wiltsie, the prosecuting attorney, did, in attempting to enforce the provisions of the Act, not represent anything, and could be merely a wrong doer. The question primarily before the court must be—Was the act valid?

The court again cites with approval as applicable to the question as to the rights of the district attorney, the case of *Reagan v. Trust Co.*, 154 U. S. 362.

This suit involved the validity of the rates fixed by the railroad commissioners of the State of Texas and upon the bill in equity filed in the Circuit Court of the United States, the defendant company was enjoined from adopting the rates, the attorney general from instituting or prosecuting any suit to collect any penalty by reason of the failure of the company to adopt such

rate, and the members of the board from any such action, by them, as would have been appropriate in aid of prosecutions by the attorney general.

In this respect the decree of the Circuit Court was affirmed. The questions involving jurisdiction are considered in 154 U. S. 388-393. Of this case, Circuit Judge Showalter, in *Central Trust Co. v. Citizens' Street Ry. Co.*, 82 Fed. 1, says:

"As the case stood, and assuming the invalidity of said sections, he (the attorney general) represented nothing. His prosecutions would simply have been gross wrongs, under color of void legislative enactments. The opinion last cited was delivered in May, 1894. The position of Mr. Wiltsie here is the same as that of the attorney general in the Reagan case. If the attorney general had not been specifically named as the officer to carry on the prosecutions under the Texas statute, that duty would have devolved upon some prosecuting attorney in Texas, and such officer, in place of the attorney general, would have been the defendant. I cannot hold that this suit, as against Mr. Wiltsie, is inhibited by the eleventh amendment, without diregarding the law as laid down by the Supreme Court of the United States. If, in the Reagan Case, sections 5 and 14 had been deemed valid, the injunction could not have issued or been sustained. Here the injunction is the purpose of the bill. If, as said, the enactment of 1897 be valid, the case fails, and the bill must be dismissed as to all defendants. If that enactment be invalid, Mr. Wiltsie, so far as the threatened prosecutions are concerned, does not represent the state in any capacity whatever."

In the case of *Southern Express Co. v. Mayor of Ensley*, 116 Fed. Rep. 756, Judge Jones, in delivering the opinion of the court (p. 759) said:

"The necessities of this case do not require much discussion of the power of a court of equity to stay or enjoin criminal prosecutions. It is to be borne in

mind that the power of the state, much less of its municipal authorities, cannot extend to regulating interstate commerce. A license imposed for revenue is the exercise of the taxing, not the police, power, and prosecutions before the corporate tribunal for doing the business without a license are *quasi* penal only, at most. In substance and legal effect, they are civil proceedings. *Royal v. Virginia,* 116 U. S. 583. The 'offense' is not a crime. The 'offense' does not violate any law for the preservation of the health, morals, liberty, or peace of the citizens of Ensley. Enjoining prosecutions of the 'offense' here, if there is any law to support it, does not in any wise interfere with the control of the local tribunals over the mass of governmental powers committed to them for the welfare of the people of Ensley under what, for want of a better name, we denominate the police power. It is about prosecutions for offenses under ordinances directed solely to that end that many of the authorities are strict in holding that courts of equity must not interfere. Some of the authorities make this distinction the test, and unhesitatingly interfere, in cases of hardships, against prosecutions, even under valid ordinances, where the matter insisted upon by the municipal authorities relates to the enforcement of its business or corporate rights, or private rights, as distinguished from ordinances exerting the police power to protect the lives, health, peace, and morals of the citizens. Other courts, whenever property rights are involved, grant or refuse injunctions against the enforcement of municipal ordinances, although violations of them are punished by penal proceedings, on the same principles on which they are granted or refused as to private individuals.

"The reason of the rule forbidding a court of equity to stay criminal proceedings can never apply in any degree to any prosecution in the criminal courts, unless the crime or offense for which the offender is prosecuted is created by some valid law or ordinance, or by laws or ordinances whose invalidity is doubtful and has not been pronounced by the courts of final resort. There is no crime here. There is no law which makes the failure to pay the license an offense. There

is no law which authorizes any tribunal to fine and imprison complainant or its agent for refusing to pay the license tax. Every arrest under this ordinance is a lawless and forcible trespass. When a court of equity restrains a trespasser from coercing submission to a lawless demand, by prosecutions for alleged crimes before courts which have no jurisdiction to try the accusation, because the law neither makes such a crime, nor authorizes any court to inquire into or to punish it, the jurisdiction of no tribunal is invaded, and 'criminal proceedings,' are not stayed in any moral or legal sense. The right and duty to intervene against such acts are in no wise affected by the so-called 'criminal' feature, but depend entirely upon the equities of the particular case. There is nothing inconsistent with these views in the decisions *in re Sawyer*, 124 U. S. 200, and in *Harkrader v. Wadley*, 172 U. S. 148. *In re Sawyer* related to removals from office, with which we are not here concerned. In the other case it is said: 'It is not contended here that the State statute under which the county court of Wythe was proceeding was repugnant to the constitution or any law of the United States, or that the state did not have jurisdiction of the offenses charged or of the person of the accused.' That case and this differ widely. There it was sought to enjoin the prosecution by state officers of an indictment for a felony found under valid laws of the state, and the injunction was really directed against the state itself. *In re Ayers*, 123 U. S. 433. * * *

"The ordinance here in question is a palpable violation of the constitution. If the municipal authorities who are engaged in enforcing this ordinance are otherwise amenable to preventive remedies of a court of equity, upon what principle of law or morals can they evade the jurisdiction, because to the usurpation of power in passing the ordinance is added the further defiance of the constitution, by declaring resistance to the ordinance a penal offense against society, and punishing it accordingly? The fact that the city officers in making the arrests were themselves trespassers, and violators of the law of the land, using the physical power of the city to effect these arrests, can in no way

affect the jurisdiction of this court, if a case is otherwise made out which justifies injunctive relief against them. *Osborn v. Bank*, 9 Wheat. 738; *Davis v. Gray*, 16 Wall. 203; *In re Debs*, 158 U. S. 564; *City Council of Montgomery v. Louisville & N. R. Co.*, 84 Ala. 130, 4 South. 626; *Port of Mobile v. Louisville & N. R. Co.*, 84 Ala. 116, 4 South. 106.

"The case made by the bill presents strong claims for equitable interference. Municipal authorities prescribe regulations for interstate commerce in violation of the law of the land, and attempt to intimidate and coerce those engaged in it to submit to their lawless exactions by arrests and threats of fine and imprisonment. They have already twice arrested defendant's agent, and solemnly avow a purpose to arrest and fine or imprison him daily until he succumbs to the lawless exactions of the city. The citizen thus oppressed and sought to be intimidated is engaged in interstate commerce. It is a common carrier also, possessed of corporate franchises, in whose orderly exercise citizens of this and other states have an interest. Its business would be ruined by the constant recurrence of these daily arrests having for their unlawful object the destruction of the business, unless those engineering the repeated trespasses are permitted to regulate interstate commerce. The constitutional right of the citizen to engage in interstate commerce cannot have full vigor and effect if the citizen cannot enforce his rights to carry on such business in the first instance by the speediest and most effective mode known to the law. The courts of the United States should not be astute to find technical reasons for denying the affirmative enforcement of such a right on the theory that the wrong would not be irreparable, if the money lawlessly exacted as a commutation for the right which the constitution gives without price can finally be recovered back from the wrongdoer. Compelling the citizen thus wronged to first pay the unlawful exaction, and then sue for damages or to recover the money, puts the constitution in abeyance for the time being and forces the citizen temporarily to submit to the wrong as a condition precedent to enforcing the constitution.

However proper such a view may be as regards ordinary trespasses to mere property rights, it seems out of place in dealing with the forcible denial of a fundamental constitutional right. The remedy at law in such a case does not seem 'as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.' *Boyce v. Grundy*, 3 Pet. 214. Be this as it may, it is settled that a court of equity should enjoin the enforcement of a municipal ordinance, though violations of it are punished criminally, when its enforcement will effect the illegal destruction of, or a grave interference with, a corporate franchise, in the operation of which the public have an interest. *City Council of Montgomery v. Louisville & N. R. Co.*, 84 Ala. 130, 4 South. 626; *Mayor, etc., v. Rodgers*, 10 Ala. 47; 2 Dill. Mun. Corp. Sec. 908. See, also, *Street Railway Cases*, 70 Ala. 465, 58 Am. Rep. 615; *Quintinni v. City of Bay St. Louis*, 64 Miss. 483, 1 South, 625, 60 Am. Rep. 62; *Lottery Co. v. Fitzpatrick*, 3 Woods, 222, Fed. Cas. No. 8, 541; *City of Atlanta v. Gate City Gaslight Co.*, 71 Ga. 107; *Third Ave. R. Co. v. Mayor, etc., of New York*, 54 N. Y. 159; *Milling Co. v. Lee* (Colo. App.), 29 Pac. 1037; *Port of Mobile v. Louisville & N. R. Co.*, 84 Ala. 116, 4 South. 106. If 'courts of equity did not interfere in cases of this sort, there would be a great failure of justice in this country.' 2 Story, Eq. Jur. Sec. 928."

In the case of *Lottery Co. v. Fitzpatrick*, 3 Woods 222, Fed. Cases No. 8541, was a motion for an injunction *pendente lite* and it was held while Courts of Chancery do not deal with matters of crime, nor questions of mere morality, (p. 261) "*there is this reservation, that it is only when those matters are not connected with the rights of property of which the court has jurisdiction,*" citing *Springhead Spinning Company v. Riley* (L. R.) 6 Eq., 588.

This is not limited to property over which the court of equity for some other reason has

already acquired jurisdiction, for the vice-chancellor, in that case, says:

"The jurisdiction of this court is to protect property, and it willinterfere by injunction to stay any proceedings whetler connected with crime or not, which go to the immediate or tend to the ultimate destruction of property, or to make it less valuable for use or occupation."

The Circuit Court in *Lottery Co. v. Fitzpatrick, supra*, then cites with approval *Osborn v. United States Bank*, 3 Wheaton, 738, and says:

"The officers of every state of the United States, whether executive or judicial, owe to the Constitution of the Unted States a fealty, an homage, an obedience surpassing that which they owe to their constituents of the state. The people of the United States, composed of all thepeople of the separate states have adopted the constitution, and have ordained that the terms of that instrument and the laws and treaties made pursuant to it, shall have obedience, anything in the constitution or laws of any state to the contrary notwithstanding: *Gibbons v. Ogden*, 9 Wheat. 1; *Dolge v. Woolsey*, 18 How., 331.

"The supremacy of this constitution, from the very frame ofthe government, in cases like this before the court, must be maintained by the courts of the United States. The judicial power was organized so that controversies arising under the constitution and laws, which asumed a judicial form, should, in some cases, originally, and in all cases, finally be determined in the courts ofthe United States, in order that in every state the consitution and laws should be understood and obeyed in the same manner: *McCulloch v. Maryland*, 4 Wheat, 316; *Ableman v. Booth*, 21 How., 506. * *

"The power of a court of chancery to restrain persons subject to the jurisdiction of the court, and parties to a cause pending before it from taking proceedings in other courts, whether domestic or foreign, to defeat the endsof such proceedings is indisputable. * * *

"But when the state itself errs and its legislature visits bya law, constantly recurring penalties upon all

the officers and agents of a corporation, it gives rise to a question of the rightfulness of the law, viewed in its operation upon franchises—upon property. For, since a corporation is an artificial being, and can only act through its representatives, any law which forbids, under penal sanctions, every conceivable corporate act of such officers and agents, must assail the value and existence of its privileges, and if that law be unauthorized, its operation may be restrained and the property, which is by the constitution exempted from its power, may be protected by the proper process of the courts: *Wood v. City of Brooklyn*, 14 Barb., 425; *Frezin v. Lewis*, 4 Myl. & Cr., 249.

"The states may define crime, affix penalties, arraign and punish those who commit the prohibited acts. Where there is no right of property involved, the Circuit Courts have no jurisdiction to deal at all with any criminal process of a state, however void may be the law from which it emanates. Such case can be submitted to the constitutional tests only by being brought from the state court of last resort before the Supreme Court of the United States. *But in a case which, as does this, involves the right of property, in which an invasion of those rights is sought to be affected through process based upon a law of a state, void, because unconstitutional,* it makes no difference whether the void law is found in a criminal or civil code, or whether the process which is sought to be made the instrument of injury bears the seal of a police magistrate or the signature of a state auditor? Both are void because resting upon a prohibited and void law of a state."

The case of *Rushville v. Rushville Natural Gas Co.*, 132 Ind. 575; 15 L. R. A. 321, was an action to enjoin defendants from enforcing a city ordinance against plaintiff's agents for the violation of such ordinance.

The appellant, the City of Rushville, by ordinance granted to the appellee the right to use the streets, etc., of the city for the purpose of laying pipes and doing the

necessary work in connection therewith in putting in a natural gas plant. The appellee accepted the franchise granted by the ordinance and expended large sums in carrying out its project. Afterwards the city enacted another ordinance, fixing the conditions under which a corporation could use the streets, etc., for the introduction of natural gas and imposing additional conditions and restrictions upon those acting under it, with penalties for its violation.

The court said:

"The appellant contends, however, that even if this is true the appellee was not entitled to relief by injunction. This question has been decided adversely to the appellant by the recent case of *Davis v. Fasig*, 128 Ind. 271, where it was held, following numerous authorities, that a court of equity may enjoin the enforcement of a city ordinance to prevent a multiplicity of actions.

"The ordinance being void as to the appellee in a most material provision, which absolutely denied to it substantial rights except on condition that it submit to unjust restricions, it had the right to go into a court of equity and have its enforcements stayed by injunction."

In the case of *Davis v. Fasig*, 128 Ind. 271; 27 N. E. Rep. 726, 737, cited in the foregoing opinion in *Rushville v. Rushville Natural Gas Co., supra.*, the court said:

"We cannot agree with counsel that a court of equity may not in a proper case, enjoin the enforcement of city ordinances to prevent a multiplicity of actions. It has been held that where an ordinance is void, any party whose interests are to be injuriously affected thereby may go into a court of equity, and have its enforcement stayed by injunction. *Mayor, etc., v. Radecke*, 49 Md. 217."

The case of *Platte & D. Canal & Milling Co. v. Lee, Mayor, et al.*, (Colo.) 29 Pacific Rep. 1036, was an action brought to determine the validity of certain ordinances adopted by the City of Denver directing a change in the construction of the ditches of plaintiff. It was held that the ordinances were invalid as affecting the complainant company, and it became necessary to determine whether a court of chancery has power to pass upon the validity of the ordinances, and enjoin the city and its authorities from prosecuting the plaintiff for a violation thereof. The court said: (p. 1039) "This brings us to the consideration of the second question: Can the court enjoin the defendants from prosecuting the complainant company for violation of the ordinances? It may be admitted that equity would not enjoin the action of municipal corporations while proceeding within the limits of their well-defined powers as fixed by law; yet it is claimed that it has undoubted jurisdiction to restrain them from acting in excess of their authority, and from the commission of acts which are *ultra vires*. High, Inj. Sec. 241. *It is a well-recognized principle that courts of equity will grant an injunction to protect a party against a multiplicity of suits.* Under the ordinance in question, as before stated, the representatives of the complainant company would be subjected daily to arrest for a failure to comply with the order of the Mayor; and should they successfully present their defense in such a proceeding, it does not follow that they would not be continuously harrassed by repeated arrests for the violation of ordinances which we have herein declared invalid. And pending the final determination of the validity of this ordinance or the completeness of the defense, innumerable actions might be commenced against them, thus subjecting them to great expense, inconvenience and embarrassment. In the case of *Smith v. Bangs*, 15 Ill. 399, Treat, C. J., lays down the following doctrine: 'A court of equity will interfere by injunction where public officers, under claim of

right, are proceeding illegally to impair the rights or injure the property of individuals or corporations, or where it is necessary to prevent a multiplicity of suits.' Where a municipal corporation is seeking to enforce an ordinance which is void, a court of equity has jurisdiction, at the suit of any person who is injuriously affected thereby, to stay its execution by injunction. *Mayor of Baltimore v. Radecke*, 49 Md. 218. We do not look upon this proceeding on the part of the city to impose a penalty for the violation of the ordinance as coming within the scope of the authorities holding that equity will not interfere by injunction to prevent criminal prosecution for violation of illegal ordinances or statutes, but rather incline to the belief that the imposition of a penalty is for the purpose of compelling the complainant to comply with the ordinance by reducing the width of the ditches, and to protect the banks of such ditches. It is true that the ordinance imposed a fine for disobedience of the order after ten days' notice, but nevertheless this must be considered in conjunction with section 10, which seeks to impose duties upon the complainant company wholly unwarranted, and which clearly infringes upon the vested rights of the company. In the case of *Cape May & S. L. R. Co. v. City of Cape May*, 35 N. J. Eq. 409, this language is used: 'Whatever doubts may have before existed respecting the power of the courts to control the acts of the municipal corporations, they seem now to be at rest, and the line defining in what cases they may intervene, and in what they should not, seems to be marked distinctly and with precision.' The rule upon this subject is stated with perspicuity by Judge Dillon, as follows: 'There can, ordinarily, be no judicial restrain or interference with the *bona fide* exercise of powers, legislative or discretionary in their nature, and which does not violate private rights.' Dill Mun. Corp. (2d Ed.) 908. Chancellor Zabriskie, in speaking upon the same topic, says: 'All legislative acts, or exercise of discretionary powers, within their authority, are beyond the control of the courts, however, unwise or impolitic, or even when done from corrupt motives, or for unworthy purposes. Their legislative powers

are, when exercised within their authority, supreme. But when the corporation have fulfilled their legislative functions, and have exercised their legislative discretion, and are about carrying their legislation into execution, then, if the effect of their acts is to violate vested rights or inflict irreparable wrong, the courts may properly intervene.

There is no difficulty whatever in applying this rule to the case in hand. It falls, indeed, directly within it. The provisions of ordinance No. 10 is aimed specifically at complainant in this case. It seeks to compel it to do certain acts which, from the very nature of things, violate vested rights, which have received recognition in the Supreme Court of this state. *City of Denver v. Mullen, supra.* 'The question of the degree of interest in the subject-matter which is requisite to render one a proper party plaintiff to institute an action for the purpose of restraining misconduct on the part of municipal corporations or their officers, is one of much practical importance, and deserving of special attention. In general, it may be said that, to warrant the interference of equity in this class of cases, the aggrieved party must show that some special and peculiar injury, personal to himself, is likely to result from the act complained of, aside from the general injury to the public.' High. Inj. Sec. 1298. What, then, is the situation of the parties to this proceeding? The company insist that they have acquired by virtue of their location and construction of this ditch, and by virtue of legislative authority, vested rights as against the city and its inhabitants. The Supreme Court of this state, in three different decisions, have upheld this assertion. The City of Denver by a general ordinance applicable to corporations of a similar nature, to be created, and those already in existence, have provided by ordinance that such corporations shall keep their ditches in good repair whenever so required to do, and all such ditches, flumes, bridges and crossings shall be located, constructed, and built under the supervision of the city, or some officer of said city duly authorized to superintend the same. And that the City Council shall have the right and power to order, from time to time, changes in

the location and construction of the same, as in their opinion the public welfare and safety require. And, further, that every person or corporation who shall fail or refuse to comply with the requirements of the ordinance, or to obey any order of the city in reference to the same, after ten days' notice, shall be fined, etc. To make this provision of the ordinance effective as against complainant company, they passed what has been denominated this 'Ordinance No. 10,' and made it applicable to the complainant company only, and insist by this subsequent ordinance that the channels of the ditches shall be confined within certain limits to carry water, and provide that, if such things are not done, then, in conformity with the provisions of section 4, the person or corporation shall be daily prosecuted, and fined for failure so to do. If this does not tend to impair vested rights, and is not calculated to inflict irreparable wrong without authority in law, then we are unable to appreciate the full force and effect of the English language. True, it may be said with some force that the ordinance imposed a penalty for failure to comply with its provisions, but such failure to so comply is not classified as a misdemeanor or a crime, but the penalty is imposed because the complainant company refused to surrender their acquired and well-recognized rights. It is the public corporation that is affected, and not the public. It is the corporation that is liable to have continually imposed upon them fines, and to be continually harrassed by legal proceedings. We think that this is a case that peculiarly addressed itself to a court of equity, and that the court erred in sustaining the demurer to the complaint. The judgment must be reversed, and the case remanded."

In the case of *Los Angeles City Water Co. v. City of Los Angeles*, 103 Fed. Rep. 711, it was held that the Circuit Court had jurisdiction of a suit by a water company to enjoin the enforcement of a municipal ordinance fixing rates of charge for water, on the ground that it impaired the obligation of the contract between

the city and the company, and that equity would restrain the city from enforcing its ordinance reducing rates of charge in impairment of the contract and in subjecting the company and its officers and employes to penal actions for its violation, and also to restrain private persons from instituting threatened prosecutions under such ordinance.

In this case Judge Ross said (p. 738):

"If the ordinance be void, and the defendant city, notwithstanding, threatens to, and unless restrained by the court, will proceed to enforce its penal provisions, including those contained in it and in the constitution and statute of California, for the forfeiture to the city of the water works in question should the complainant charge other rates than those therein prescribed, and otherwise dispossess the complainant of the property, nothing can be plainer than that a court of equity ought to restrain the city, and its power to do so is quite as clear. *Iron Mountain R. Co. v. City of Memphis,* 35 C. C. A. 410, 96 Fed. 113; *Southwest Missouri Light Co. v. City of Joplin* (C. C.) 101 Fed. 23. And if, as is alleged, certain of the water consumers, acting under such statutory provisions and under the same provisions of the ordinance in question, threaten to, and will, unless restrained, commence similar suits for the forfeiture of the works to the city, *and criminal suits against the complaint and those acting for it, as provided in the ordinance,* ought not a court of equity to restrain them also? Undoubtedly so. It is only by such means that the rights of the complainant under the contract can be protected. See decree in *National Water Works Co. v. Kansas City,* 10 C. C. A. 653, 62 Fed. 853, 867; *Singer Sewing Mach. Co. v. Union Buttonhole & Embroidery Co.,* 22 Fed. Cas. 222 (No. 12,904); Wat. Spec. Perf. Cont. Sec. 109; 1 Beach, Inj. Sec. 444."

In the case of the *City of Atlanta v. Gate City Gaslight Company,* 71 Georgia 196, the Supreme Court of Georgia said:

"That injunction was the proper remedy to restrain the defendants from interfering with and hindering the prosecution of the complainant's work under its charter, is evident, both upon principle and authority. While a court of equity will not interfere by an injunction with the prosecution of a criminal proceeding [53 Ga.,677,(4);61 *Ib.*,386;68 *Ib.*,64], yet, where it is evident that private property and civil rights are invaded by such means, equity will interfere to protect them. 'If the charge be of a criminal nature, or offense against the public, and does not touch the enjoyment of property, then a court of equity should not interpose by injunction.' On the other hand, where it is manifest, as in this case, *that a prosecution and arrest is threatened for an alleged violation of city ordinances for the sole purpose of preventing the exercise of civil rights conferred directly by law, injunction is a proper remedy to prevent injury to the party thus menaced.* 55 Ga. R., 601 (5), 619; 50 *Id.* 451.

"'A court of equity,' says Kerr (Injunctions 2),'has no jurisdiction in matters merely criminal or merely immoral, which do not affect any right of property. If a charge be of a criminal nature, or of an offense against the public peace, and does not touch the enjoyment of property, jurisdiction cannot be entertained. * * * But if an act which is also criminal touches also the enjoyment of property, the court has jurisdiction, but its interference is founded solely on the ground of injury to property.' Many cases and elementary writers might be cited to sustain the distinction here laid down."

In the *City of Austin v. Austin City Cemetery Ass'n*, 28 S. W. Rep. 528, the Supreme Court of Texas said:

"We are of the opinion that, if the ordinance in controversy be void, the appellee is entitled to restrain its enforcement by the writ of injunction. It is not to be contraverted that, as a general rule, the aid of a court of equity cannot be invoked to enjoin criminal prosecutions. This rule is, however, subordinate to the general principle that ***equity will grant relief when there is not a plain, adequate, and complete remedy at***

law; and, when it is necessary to prevent an irreparable injury. Courts of criminal jurisdiction have power to enforce an observance of statutes against crime by visiting upon offenders the penalties affixed for their infraction, and ordinarily no one can call to his aid the powers of a court of equity in order to enforce their observance. Yet it has been held that 'the court will interfere to prevent acts amounting to crime, if they do not stop at crime, but also go to the destruction or deterioration of the value of the property.' *Spinning Co. v. Riley*, L. R. 6 Eq. 551. This, however does not assist us materially in the solution of the present question. It would seem clear that if a party could be enjoined from doing an act, not criminal in its nature, which is injurious to the property of another, he could also be enjoined if the act be one made punishable by law as a crime. The punishment of the criminal, when the act committed has injuriously affected the value of the property of another, does not repair the injury. The question under consideration arises upon quite a different case. Here the appellee seeks to enjoin the city of Austin from enforcing an ordinance which it claims to be void, and says that, if the enforcement be not restrained, it will result in an irreparable injury. In behalf of the city it is answered that, if the ordinance be invalid, there exists a plain, adequate, and complete remedy at law. It is true that, if the ordinance be void, any one prosecuted under its provisions may have it so declared, either in the original criminal action, or by suing out a writ of *habeas corpus*. Notwithstanding this fact,it is clear to us,without the statement of the conclusion by the court of civil appeals, that the effect of the ordinance is such that, if its enforcement be not restrained, it may result in a total destruction of the value of appellee's property for the purpose for which it was acquired." * * *

"Suppose a city, not having the power under its charter to do so, should pass an ordinance prohibiting the sale of butchers' meat in a certain locality, and suppose it should also prohibit any one from selling meat to be there sold, or from buying it in the prohibited place. The ordinance would be void; but could any

one say that the business of a market man in the locality might not be effectually destroyed by it? Under such circumstances, we are of opinion that he should have the right to proceed against the corporation to enjoin its enforcement. If a penalty was denounced against no one but the market man who should sell, it would seem that his remedy would be to proceed with his business, and defeat any prosecution that should be brought against him for the infraction of the void ordinance. But to deny a remedy in a court of equity in the case first supposed, or in the present case, analagous to it, would be, we think, to disregard the fundamental principle upon which such courts are established."

The case of *Port Mobile v. Louisville & N. Railway Co.*, 4 So. Rep. 106 (Ala.) was a case brought by the Louisville & Nashville Railway Company against the Port of Mobile to enjoin the enforcement of certain ordinances of that municipality which were alleged to be in violation of the charter of the plaintiff corporation. It was contended that a court of equity did not have jurisdiction because in the ordinances, the enforcement of which it was sought to enjoin, it was provided under a penalty it should be prosecuted for each violation of the ordinance. The Supreme Court of Alabama said: (p. 110)

"The jurisdiction of a court of equity to protect a franchise of this kind from unlawful invasion or disturbance is clearly settled, and has been often recognized by this court as benign and salutary. The value of such a right, or the cost of its unlawful disturbance, cannot be reduced to a pecuniary measure. When the purpose is its utter destruction, the duty to protect becomes correspondingly more urgent and imperative. The ground of its exercise is usually the prevention of irreparable injury, or such as cannot be adequately estimated in damages

at law; at other times, the avoidance of a multiplicity of suits, and again the abatement of annoyance in the nature of a legal nuisance. Another controlling reason for interference by equity in such cases is that the public at large have an interest in the protection of such a privilege, as well as the parties partly interested. [*Stage Co. v. Society*, 15 Abb. Pr. (N. S.) 51]. The party aggrieved is not required to establish his right at law, before he is permitted to evoke the aid of equity, if such right is clear and free from doubt. The verdict of a jury is only necessary where the right claimed is doubtful. The right is here determined by a municipal ordinance in the nature of both a grant and a contract, which is in writing. Its construction is for the court, and not for the jury. *Mayor v. Rodgers*, 10 Ala. 37; *Turnpike v. Ryder*, 1 Johns. Ch. 611; *Harrell v. Ellsworth*, 17 Ala. 576; *Turnpike v. Miller*, 9 Amer. Dec. 274; *Com. v. Railroad Co.*, 24 Pa. St. 159, 62 Amer. Dec. 372; *Attorney General v. Heishon*, 18 N. J. Eq. 410, 2 Dill. Mun. Corp. Sec. 907.

"It is too clear for argument that it is no objection to the exercise of this jurisdiction that the attempted invasion of the franchise sought to be protected is accompanied by acts which are personal trespasses. A court of equity will not, it is true, interfere to enjoin a mere trespass of an ordinary character either upon the person or property. The remedies afforded at law are deemed adequate in cases of this kind. *Railroad Co. v. Walton*, 14 Ala. 207. But the cases are numerous in which the arm of this court has been successfully invoked to enjoin trespasses, which, if unrestrained, would probably result in irreparable mischief, or where such mischief might be completely effected before a trial at law could be had as to the controverted right. Judge Story thus states the rule: 'If the trespass be fugitive and temporary, and adequate compensation can be obtained in an action at law, there is no ground to justify the interposition of courts of equity. Formerly, indeed, they were extremely reluctant to interfere at all, even in regard to repeated trespasses. But now there is not the slightest hesitation if the acts done, or threatened to be done, to the

property would be ruinous or irreparable, or would impair the just enjoyment of the property in the future. If, indeed,' he concludes, 'courts of equity did not interfere in cases of this sort, there would be a great failure of justice in the country.' 2 Story, Eq. Jur. Sec. 928. The chancery court of England had come up to this advanced view of the law as early as the days of Lord Hardwicke. *Coulson v. White*, 3 Atk. 21. And this view is now supported by an unbroken array of uniform authorities, speaking with one voice on the subject. *Jerome v. Ross*, 7 Johns Ch. 315, 11 Amer. Dec. 484, note, 498-507; *Lyon v. Hunt*, 11 Ala. 295, 46 Amer. Dec. 216; *Scudder v. Falls Co.*, 23 Amer. Dec. 756; *Poindexter v. Henderson*, 12 Amer. Dec. 550; *Burnley v. Cool*, 13 Tex. 586, 65 Amer. Dec. 79; *White v. Flannigain*, 1 Md. 525, 54 Amer. Dec. 668. The case of *Osborn v. Bank*, 9 Wheat. 738, is a familiar and high authority, from one of the greatest of judges, for the position that where a trespass, or a series of trespasses, operate, in effect, to destroy or seriously impair the exercise of a franchise, a court of equity will not hesitate to interpose to prevent the apprehended injury by the aid of injunction. And in *Stage Co. v. Society*, 15 Abb. Pr. (N. S.) 51, it is expressly held that an injunction would lie to restrain the persistent commission of trespasses of a mere personal nature, where they affect a corporate franchise. And the same principle has been recognized by this court in a case where it was sought to enjoin the enforcement of a municipal ordinance, the violation of which was attended with a penalty. *Moses v. Mayor*, 52 Ala. 198. The equity of the present bill can be supported upon the ground that the court will lend its aid to prevent the destruction or serious impairment of a vested franchise, the value of which cannot be adequately estimated in damages. The case is strengthened by the further consideration of preventing expensive and vexatious litigation accompanied by a multiplicity of suits, and the insolvency of the defendants, by whom the alleged grievances are threatened,—facts which strongly corroborate the alleged inadequacy of any legal remedy open to the com-

plainant in the courts of law. The records of our courts present few cases of threatened injury so irreparable in nature, or for which a verdict of damages at law would furnish so inadequate compensation. *Jerome v. Ross*, 7 Johns Ch. 11 Amer. Dec. 484, note, 500-507.

"The suggestion that the court, under peculiar circumstances of this case, must abdicate this jurisdiction because of the fact that it is dealing with an ordinance of a municipal corporation of a quasi criminal character, the violation of which is made an offense, does not strike us favorably. The power to prevent irreparable injury flowing from the deficiencies and injustice of the more technical rules of the common law, may be said to be the very life of equity jurisdiction. The court must, therefore, be jealous of its preservation, notwithstanding it may also be cautious in its exercise. Municipal corporations can claim no exemption from being subject to it. They must stand in our courts upon terms of equality with all other corporations and with natural persons. Our constitution declares that 'all corporations shall have the right to sue, and shall be subject to be sued, in all courts, in like cases as natural persons.' Const. 1875, Art. 14, Sec. 12. 'The legal effect of this provision is to place municipal corporations, as nearly as practicable, upon a basis of equality in the enforcement and defense of their rights in courts of justice in this state.' *Railroad Co. v. Mirris*, 65 Ala. 193; *Davis v. Mayor*, 1 Duer, 452. And the rule, accordingly, must apply with peculiar force with us, which is said by Mr. Dillon to be generally recognized elsewhere, that 'equity will interfere in favor of or against municipal corporations on the same principles by which it is guided in other cases.' 2 Dill. Mun. Corp. Sec. 908. *It cannot be tolerated that municipal corporations in view of these principles, should escape the grasp of a court of chancery, in a clear case of equitable cognizance, by the device of adding a penalty to an illegal ordinance, which is designed as a repudiation of its own valid grants or contracts*, especially in a case where the public are largely concerned, and a court of law can afford no remedy adequate for the prevention of irreparable

injury that would probably result from the enforcement of such ordinance. There is nothing in the case of *Burnett v. Craig*, 30 Ala., 135, 68 Amer. Dec. 115, which is in conflict with the foregoing views, as will appear from the later case of *Moses v. Mayor*, 52. Ala. 198. *The mere fact that an act is criminal does not divest the jurisdiction of equity to prevent it by injunction, if it be also a violation of property rights, and the party aggrieved has no other adequate remedy for the prevention of the irreparable injury which will result from the failure or inability of a court of law to redress such rights.* 1 High, Inj. Sec. 20; *Mayor v. Radecke*, 49 Md. 217, 33 Amer. Rep. 230; *Railroad Co. v. New York*, 54 N. Y. 159; *Mayor v. Waring*, 41 Ala. 139."

The proposition for which we are contending is in direct conflict, and hence this appeal, with the opinion rendered by the learned judge sitting in the Circuit Court in this case, when he denied the motion for an injunction and dismissed the bill for want of equity, holding, as in the opinion appearing in the record, that courts of equity were without jurisdiction to enjoin criminal prosecutions under a statute or ordinance alleged to be unconstitutional, even though it is also alleged that it is the purpose of such prosecutions to injure complainant in its property rights, and such will be their effect.

With great respect to the learned judge of the court below, who rendered this opinion, we here maintain that that opinion is against the great weight of the authorities to which we have already called this Court's attention and contrary to the spirit of the decisions of this Court, to which we shall refer and quote from hereafter.

While the question was squarely presented and fully

considered by the learned judge of the Circuit Court, we are constrained to say that the current of authority on this subject is not in accordance with that opinion. That opinion gave great weight, and as a basis of the argument therein, relied upon the case of *In re Sawyer*, 124 U. S. 200, but we have failed to find any case where there was involved the question of the right of a court of equity to enjoin prosecutions under invalid ordinances where property rights were affected, especially where they were acquired by legislative authority, that the courts have not held that equity had jurisdiction to enjoin prosecutions under such invalid ordinances.

In the case of *Suess v. Noble*, 31 Fed. Rep. 855, and in the case of *Minneapolis Brewing Company v. McGillivary*, 104 Fed. Rep. 258, relied upon by the learned judge of the Circuit Court in his opinion in this case there was no question as to the destruction or invasion of civil rights which had become vested under any legislative grant or authority. There had been no law making it lawful to engage in any of the business enterprises therein contemplated within a certain district and so far as the record discloses in those cases, the public authorities were simply endeavoring to enforce in good faith the penal provisions provided for in those statutes for the protection and preservation of the peace and good order of the community. With full knowledge of the power to pass such laws and that the municipal authorities would enforce them, the plaintiffs continued to acquire possession of the goods which they were dealing in and manufacturing and brought these actions for the sim-

ple purpose of testing the validity of the local laws and ordinances, ample opportunity of testing which was given in a criminal court without invading the domain of a court of equity in their behalf.

Between, however, the case of the *City of Atlanta v. Gate City Gaslight Company, supra,* the case of *Port of Mobile v. Louisville & Nashville Railway Company, supra,* the *City of Austin v. City of Austin Cemetery Ass'n, supra,* and other cases in that line that we quoted from in this argument, on the one hand, and the cases of *Suess v. Noble, supra,* and *Minneapolis Brewing Co. v. McGillivary, supra,* and *in re Sawyer, supra,* on the other hand, there is a wide difference and distinction.

In the Atlanta case the city stood by and saw the company making an outlay of $140,000 in the exercise of their rights under their charter without intimating to them that objection would be made to the use of the streets for the purposes authorized, and without the use of which their enterprise would not have been undertaken, and could not be prosecuted, and without which they would lose their entire outlay and be irreparably ruined. When the Gas Light Company was ready to begin the work of laying its mains the municipal authorities sought to prevent it from exercising its valuable vested corporate franchise by first refusing it permission to excavate and use the streets of the city for the purpose of laying its pipes and then threatened under certain city ordinances to prosecute and punish any of its agents or employes who, without such permission, should undertake to do so. The court

showed in that case, as we claim in the case at bar, that the permission of the city was not necessary to enable the complainant to exercise its franchise.

In the case at bar, relying in good faith upon the city ordinance of August 26th, 1901, and the permit granted by the Fire Commissioners to its employer, the appellant has gone ahead with its work, and in the erection of said gas works had expended a large amount of money between November 22nd, 1901 and March 3rd, 1902, and before the city took any action in the matter it had all the material upon the ground and had the work upon the gas holder nearly completed, and as was said by the Georgia case, upon every principle of equity, the failure to notify it or the intention of the city to stop the work until this heavy expenditure had been made would estop the city; that such conduct was fraudulent in the eye of the law and practiced upon an innocent party seeking *bona fide* to carry out its contract under rights then existing and thereby granted, would debar the city from now being heard. And as was held in the Atlanta case, the ordinance making penal the continuation of the work were void as affecting the vested rights of the appellant and its employer.

It was said by the Supreme Court of Georgia in the Atlanta case, *"where it is manifest* [as in this case] *that the punishment and arrest is threatened for an alleged violation of a city ordinance for the sole purpose of preventing the exercise of civil rights conferred directly by law, injunction is a proper remedy to prevent injury to the party thus menaced."* The distinguishing feature in the Atlanta case was the pat-

ent fact that the threatened prosecutions under the municipal ordinance were being used not for the legitimate purpose of preventing the streets of the city from being unlawfully injured or obstructed, but for the purpose of destroying the valuable vested franchise of the Gas Light Company.

Equity seeing the palpable fraud that was being perpetrated under color of what purported to be a simple police regulation stretched its strong arm to prevent the irreparable damage which would ensue if it did not afford its protection to the rights which were thus imperiled. It was long ago decided by this Court "that an injunction will be granted to prevent the franchise of a corporation from being destroyed, as well as to restrain a party from violating it by attempting to participate in its exclusive privileges." *Osborn v. Bank*, 9 Wheat. 738.

And the principle of all the cases that we have cited is this, that when damages will be irreparable if the threatened injury is not prevented and property rights are to be destroyed by means of void ordinances, that equity if properly appealed to will not permit such destruction of property rights whether vested in corporate franchises or in property rights belonging to individuals. And that by the mere device, as was said in *Port Mobile v. Louisville & N. R. Co.*, *supra.*, of adding a penalty to an illegal and void ordinance where property rights are involved, a municipal corporation cannot escape the grasp of a court of chancery.

In the case at bar, as in those cases, acting upon the good faith of the ordinance and rules and regulations of the City of Los Angeles, the em-

ployer of appellant acquired vested rights which cannot be destroyed by a void ordinance, though penalties are prescribed therein if it is violated, without relief being granted in a court of equity if properly sought. These cases we have cited do not conflict in any respect with the cases of *Suess v. Noble, supra,* and *Minneapolis v. McGillivary, supra,* because in these cases there was no destruction or invasion of civil rights which had become vested under legislative grants or authorities.

There is nothing inconsistent with the views for which we contend in the decisions of *In re Sawyer, supra,* or in *Harkrader v. Wadley,* 172 U. S. 148. *In re Sawyer* relates to removals from office and the question as to the jurisdiction of a court of equity was not directly involved. As to the discussion of this Court in that case of the want of jurisdiction in a court of equity over criminal proceedings, it was very aptly said by Mr. Justice Field in his concurring opinion that he "did not perceive its application to the present case."

It is not presumptuous on our part to say that case does not apply to the case at bar, and that it is not an authority in determinining the questions here presented. The proceedings that had been enjoined and for the violation of the injunction in which the petitioners in that case had been committed for contempt, were proceedings before the common council of the City of Lincoln, Nebraska, and were not criminal in any sense. The questions involved did affect property rights; and it was so determined by this Court.

While it is said by this Court in that case that a court of equity has do jurisdiction over the prosecution or punishment or pardon of crimes or misdemeanors, yet Mr. Justice Gray in delivering the opinion of this Court in that case recognized that a court of equity had jurisdiction to protect the rights of property. He says: (p. 210)

"The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of the rights of property."

Mr. Justice Gray also quotes with approval the case of *Sheridan v. Colvin*, 78 Ill. 237, where it was held that a court of chancery had no jurisdiction to restrain by injunction a city council from passing an ordinance unlawfully abolishing the office of Commissioner of Police.

The Supreme Court of Illinois in that case said:

"It is elementary law, that the subject matter of the jurisdiction of a court of chancery is civil property. The Court is conversant only with questions of property and the maintenance of civil rights. Injury to property whether actual or prospective, is the foundation on which the jurisdiction rests."

That Mr. Justice Gray recognized this question of property rights as being an exception to the rule laid down by him *in re Sawyer, supra*, that equity would not enjoin purely criminal proceedings *vide Central Trust Bank v. Gitizens' Street R. R. Co., supra.*

In the case of *Harkrader v. Wadley, supra,* there was no question as to the validity of the statute, and the proceedings were under a valid statute, and we have not contended that injunctions would lie to re-

strain an officer from proceeding under a valid statute.

The case of *Arbuckle v. Blackburn*, 113 Fed. Rep. 616, was like the case of *Harkrader v. Wadley, supra*, in that the defendant was not proceeding under an invalid law of the state, but under a valid law, his error being in wrongfully construing the statute so as to include the complainant's product.

This Court has recognized that a court of equity has jurisdiction over a case like the one now presented.

The case of *Smyth v. Ames*, 169 U. S. 466, was an action brought by certain stockholders of the Union Pacific Railroad Company to enjoin certain persons holding office in the State of Nebraska from enforcing certain penalties under certain acts of the Legislature of the State of Nebraska in reference to the regulation of railroads and classifying freights and fixing the maximum rates to be charged for the transportation of freights upon each of the railroads in the State of Nebraska, and providing penalties for a violation thereof. It was claimed that the acts were in violation of the Constitution of the United States. Mr. Justice Harlan, delivering the opinion of this Court said: (p. 517.)

"In these cases the plaintiffs, stockholders in the corporations named, asked a decree enjoining the enforcement of certain rates for transportation upon the ground that the statute prescribing them is repugnant to the Constitution of the United States. Under the principles which in the Federal system distinguish cases in law from those in equity, the Circuit Court of the United States, sitting in equity, can make a com-

prehensive decree covering the whole ground of controversy and thus avoid the multiplicity of suits that would inevitably arise under the statute. The carrier is made liable not only to individual persons for every act, matter or thing prohibited by the statute, and for every omission to do any act, matter or thing required to be done, but to a fine of from one thousand to five thousand dollars for the first offense, from five thousand to ten thousand dollars for the second offense, from ten thousand to twenty thousand dollars for the third offense, and twenty-five thousand dollars for every subsequent offense. The transactions along the line of any one of these railroads, out of which causes of action might arise under the statute, are so numerous and varied that the interference of equity could well be justified upon the ground that a general decree, according to the prayer of the bills, would avoid a multiplicity of suits, and give a remedy more certain and efficacious than could be given in any proceeding instituted against the company in a court of law; for a court of law could only deal with each separate transaction involving the rates to be charged for transportation. The transactions of a single week would expose any company questioning the validity of the statute to a vast number of suits by shippers, to say nothing of the heavy penalties named in the statute. Only a court of equity is competent to meet such an emergency and determine, once for all and without a multiplicity of suits, matters that affect not simply individuals, but the interests of the entire community as involved in the use of a public highway and in the administration of the affairs of the quasi-public corporation by which such highway is maintained."

In the case of *Vicksburg Waterworks Co. v. Vicksburg*, 185 U. S. 65, it was contended that the bill did not disclose any actual proceeding on the part of the city to displace the complainant's right under contract, that mere apprehension that a legal action might be taken by the city cannot be basis for enjoining such action, and that, therefore, the Circuit Court

did right in dismissing the bill. In reference to this, this Court said, p. 82:

"We cannot accede to this contention. It is one often made in cases where bills in equity are filed to prevent anticipated and threatened action. But it is one of the most valuable features of equity jurisdiction, to anticipate and prevent a threatened injury, where the damages would be insufficient or irreparable. The exercise of such jurisdiction is for the benefit of both parties; in disclosing to the defendant that he is proceeding without warrant of law, and in protecting the complainant from injuries which, if inflicted, would be wholly destructive of his rights."

The case of *Detroit v. The Detroit Citizens' Street Railway Company*, 184 U. S. 368, was a bill in equity filed by the railroad company for the purpose of obtaining an injunction to restrain the city of Detroit and the individual defendants from enforcing certain ordinances of the common council of the city, adopted in 1899, reducing fare on the various city railways of the complainant on the ground that such ordinances were in violation of the federal constitution because they impaired the obligations of contracts theretofore entered into between the city and the predecessors of the plaintiff. The Circuit Court of the United States granted an injunction and the defendants appealed to this Court. In delivering the opinion of this Court in that case, Mr. Justice Peckham said:

"A question has arisen at the outset as to the jurisdiction of a court of equity over a case like the one now presented. Assuming the right to relief in some form, has the complainant a plain and adequate remedy at law, or is the case such in its nature and in the relief demanded as would be cognizable in a court of equity? The foundation of the right of action lies in the alleged invalidity of the ordinances of 1899, reducing the rates

of fare on the railways of the complainant, because, as averred, those ordinances are in violation of the Federal Constitution, as impairing the obligation of contracts between the parties already existing, and therefore the claim is made that they should not be permitted to be enforced against the complainant where such enforcement might result in a multiplicity of suits, or in harassing and expensive litigation.

"The averments in the complainant's bill upon this subject, which are set forth in the above statement of facts, show the additional and special grounds upon which the jurisdiction in equity is invoked. Of course, if the complainant obey these ordinances, no controversy can arise, but if in good faith it believe them to be invalid and hence not binding upon it, and without resorting to the courts for equitable relief, it refuses to obey them, the consequences may be not only embarrassing but may lead to much unnecessary and expensive litigation. Continuous demands for the tickets mentioned in the ordinances at the reduced price therein provided for may be made by passengers while in the cars of the complainant, and they may refuse to pay fare at the old rate, and may carry such refusal to the point of suffering removal from the cars on account of nonpayment of fare. What amount of force would be necessary in the opinion of the various passengers to demonstrate that their going was not voluntary would of course give rise to disputes between them and the conductors, and would possibly, if not probably, lead to frequent breaches of the peace in the course of these attempts at removal. If not removed, then the passengers would either pay no fare or the complainant would have to accept the fare as provided in the ordinances of 1899, and that would be the same in fact as submitting to their enforcement.

"The roads operated by complainant are also indebted to an extent of over eight million dollars, secured by mortgages upon the railways, their franchises, rights and privileges, together with the tolls and fares, earnings and profits arising therefrom, and some of this indebtedness is soon to mature, and it is admitted that the bonds issued as evidence of such indebtedness

and secured by its mortgages were so issued and sold to and purchased by the holders thereof in the full faith and belief that the various roads represented by the complainant had the right to charge the rates of fare fixed by the ordinances already mentioned; such belief being based upon the existence and terms of such ordinances.

"The ability of the complainant to renew or extend its mortgage indebtedness might depend upon belief in the validity of the contracts as to the rates of fare agreed upon before the attempted alteration thereof by the ordinances of 1899. The immediate enforcement of these later ordinances might result in such a decrease of income as to seriously imperil the solvency of the complainant. An equitable action like this would certainly be more adequate and offer more effective and immediate relief than for the complainant to await the various actions at law to which it would otherwise be subjected by the defendants and the individuals demanding the reduced rates for transportation.

"The mayor and corporation counsel here, as is seen, been joined with the city as defendants in the suit. The reason for the joining of the individual defendants would seem to be that they are the officers upon whom would devolve the execution of the ordinances passed by the common council, and in the answer of the defendants it is admitted that they intend to enforce obedience by the company to such ordinances. The case is similar in some of its aspects to that of *Smyth v Ames*, 169 U. S. 466. It is true there are no penalties fixed in the ordinances for disobedience to their commands on the part of the company, but the bill shows that there are a large number of passengers carried over the roads of the complainant daily, amounting to many thousands, each of whom would have the right to demand transportation at the rates provided for by the ordinances in case they were valid. As is said in *Smyth v. Ames*, page 518, 'The transactions of a single week would expose any company questioning the validity of the statute to a vast number of suits by shippers, to say nothing of the heavy penalties named in the stat-

ute. Only a court of equity is competent to meet such an emergency, and determine, once for all, and without a multiplicity of suits, matters that affect, not simply individuals, but the interests of the entire community as involved in the use of a public highway and in the administration of the affairs of the quasi-public corporation by which such highway is maintained.'

"While this is not such an extreme case, and there are no penalties provided in the ordinances for disobedience, yet the same principle applies.

"It is a matter of general public interest, as well as of vital importance to the complainant, that the question involved in this litigation should be determined at the earliest possible moment, and once for all, and thus a multiplicity of suits and other complications prevented.

"Taking all these facts into consideration, and bearing in mind that the answer does not set up any defense of the lack of jurisdiction of a court of equity over the subject-matter, and does not insist that there is an adequate and plain remedy at law, (and no such objection has been taken at any time, and has not been insisted upon before us,) we do not feel compelled, under the peculiar circumstances of the case, to ourselves take notice of it.

"It is not such a case as on its face equity could have no jurisdiction over, such as an action to recover damages for an assault, or for a libel or slander, but the question between the parties as to the validity of various ordinances and the right of the city to enforce them, involving, as they may, the credit and possibly the solvency of the complainant, and taking into consideration the public interests involved in a speedy and final determination of the question, all these as well as other facts already mentioned, we think, make out a case for the following general rule, that a defense of this nature will not be recognized where it has not been taken by answer or in any other manner, and is not insisted upon on the hearing before the court. *Reynes v. Dumont*, 130 U. S. 354; *Kilbourn v. Sunderland*, 130 U. S. 505; *Brown v. Lake Superior Iron Co.*, 134 U. S. 530.

"We do not mean to assert that in all cases of this nature, involving simply the validity of a subsequent ordinance or law, a court of equity would be the proper forum, but confine our decision to the special facts of this case, including the fact that no objection has been taken to the jurisdiction of the court at any stage of the litigation, and is not now raised by any party to the same."

We recognize the fact that this Court in this case noticed the fact that the answer did not set up any defense of the lack of the jurisdiction of a court of equity over the subject matter nor was it insisted that there was an adequate and plain remedy at law and that no such objections were taken at any time or insisted upon before the court, and that a defense of this nature would not be recognized where it was not taken up by answer or in any other manner or insisted upon on the hearing before the court in a case over which on its face equity had jurisdiction. But it will be noticed on an examination of that case that it was a case, as the case at bar, over which equity would have jurisdiction under well recognized principles of equity jurisprudence. In that case the foundation of the right of action was in the alleged invalidity of the ordinance of 1899 reducing the rates of fare on the railways of complainant because, as averred, those ordinances were in violation of the Federal Constitution as impairing the obligations of contracts between the parties already existing, and therefore the claim was made that they should not be permitted to be enforced against the complainant when such enforcement *might result in a multiciplicity of suits*

or in harrassing and expensive litigation. In addition to this it was determined by this Court that the immediate enforcement of these later ordinances might result in such a decrease of income as to seriously imperil the solvency of the complainant, and thus result in irreparable loss to the complainant. It was a matter of public interest that the litigation should be determined at the earliest possible moment and once for all, and thus a multiplicity of suits and other complications prevented.

These are well recognized and fundamental principles upon which equity jurisdiction often depends, as shown by the cases from which we have quoted at length and was the basis upon which the injunction was granted in those cases. It is the very foundation of the case at bar and whether the question is raised by the demurrer or not, does not take it out of those well recognized and fundamental principles of equity jurisprudence. Jurisdiction is not granted by consent or refused by objection of the defendant. It is determined upon larger principles and considering the expressions of this Court in the cases of *Smyth v. Ames, supra, Vicksburg Water Works Co, v. Vicksburg, supra,* and *Detroit v. Detroit Citizens' Street Railroad Company, supra.*

We firmly believe that as this case is now fairly presented to this Court it will sustain the jurisdiction of a court of equity to enjoin the enforcement of void city ordinances to prevent a multiplicity of actions, or to protect property rights injuriously affected or im-

paired thereby, especially when said rights have been acquired under legislative authority.

The fact that municipal and city regulations are usually rendered effective by making their violation punishable offenses does not militate against the jurisdiction of a court of equity to protect against invasion by invalid ordinances all property rights.

This Court in the case last cited well decided that the presence or absence of penalties for disobedience of the ordinance did not alter the principle and confining the question before the court to the principle, as we have stated it, that courts of equity will enjoin the enforcement of void city ordinances to prevent a multiplicity of actions or to protect the property rights injuriously affected or impaired thereby, especially when they are acquired under legislative authority, gives no cause for alarm that courts of equity would be found "exercising supervisory power over the administration of a part, not inconsiderable, of the criminal laws of the country."

The case made by the bill presents strong claims for equitable interference. The municipal authorities of the City of Los Angeles, in violation of all the rights of appellant and its employer, passed ordinances that absolutely prohibited the erection of the work in which the appellant was engaged and attempted to intimidate and coerce those engaged in the work to submit to their lawless exactions and stop all work in which the appellant and its employes were engaged by arrests and threats of fine and imprisonment. The city authorities have already four times arrested the employes of appellant and solemnly avowed that it

was their intention to keep on arresting them daily until they stopped and desisted from all work upon the enterprise in which they were engaged. We have shown that they were engaged, at the time of the passage of this ordinance, in a lawful occupation.

The plaintiff has no remedy against the defendant for damages, for in the absence of a statutory provision in the State of California imposing the liability, a municipal corporation is not liable for the misfeasance, malfeasance or nonfeasance of its officers.

The defendant was not liable for the wrongful arrest and imprisonment by its officers of the employes of the appellant, or forcing the appellant to desist and cease from the work of constructing the gas works. *Stedman v. San Francisco*, 63 Cal. 193; *Chope v. Eureka*, 78 Cal. 508; *Doeg v. Cook*, 126 Cal. 213.

The complainant has no speedy and adequate remedy at law and it is a fundamental principle of equity jurisprudence that a remedy at law must be as practical and efficient to the ends of justice, and its prompt administration as the remedy in equity.

The long delays incident to the trial of actions at law when the men are arrested, before the magistrate, on appeal, on habeas corpus and on writs of error, with work delayed, contracts unfulfilled and heavy damages incurred, and the appellant, perhaps, ruined, the remedy at law is not such an adequate remedy as may be had in equity, where once for all, and without a multiplicity of suits, matters that affect not simply the appellant, but its employer and the interests of

the entire community, involved in public utilities such as are described in this complaint, may be determined. The public have a large interest in the protection of the rights which they have granted under their constitutional franchise.

In the case of *Boyce's Executors v. Grundy*, 3 Peters, 377, this Court, referring to the sixteenth section of the judiciary act prohibiting suits in equity where there is a plain adequate remedy at law, said:

That that section was "merely declaratory on the subject of legal remedy. It is not enough that there is a remedy at law. It must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration, as the remedy in equity."

In the case of *Walla Walla City v. Walla Walla Water Company*, 172 U. S., 1, 12, this Court also said:

"This Court has repeatedly declared in affirmance of the generally accepted propostion that the remedy at law, in order to exclude a concurrent remedy at equity, must be as complete, as practical and as efficient to the ends of justice and its prompt administration, as the remedy in equity. *Boyce's Executors v. Grundy*, 3 Pet. 210, 215; *Ins. Co. v. Bailey*, 13 Wall. 616, 621; *Kilbourn v. Sunderland*, 130 U. S. 505, 514; *Tyler v. Savage*, 143 U. S. 79, 95."

If "courts of equity did not interfere in cases of this sort, there would be a great failure of justice in this country." 2 Story, Eq. Jur., Sec. 928.

We may therefore conclude that when property rights are involved a court of equity may enjoin the enforcement of a void city ordinance to prevent a multiplicity of actions or to protect the property rights in-

juriously affected or impaired thereby, especially where property rights are acquired under legislative authority.

We should be suspected of purely personal motives in this matter if we did not recognize the importance of these questions thus presented and how far reaching may be the decision of this Court in determining them in accordance with the sentiments and arguments we have advanced. They are important to appellant and more particularly to its employer, Mrs. Caroline W. Dobbins, because of the large interests involved; but they also affect the interests of a large and prosperous community in which it is proposed by her to conduct the business of supplying a public utility, a right which is granted and protected by the Constitution of the State of California. They affect also all other business enterprises, not only of the state of California, but of this entire country where vested rights are to be maintained as sacred; for if vested rights are no longer inviolable, but may be put in jeopardy at any time by the will and caprice of the municipal authorities, and no remedy is provided for speedy and adequate relief, property rights may be destroyed and their use perverted. It would be a most dangerous precedent to hold that all property was subject to the mere will and fiat of the municipal authorities, and that a court of equity had not jurisdiction to protect property rights threatened with destruction by the attempted enforcement of invalid municipal ordinances. Large enterprises would not be undertaken without the security given and the protection afforded by the inviolability of contracts and

the prompt and efficient protection afforded by a court of equity.

The submission of these questions to this Court is with the full understanding that their importance is fully appreciated, and that they will be decided so as to sustain at once the best interests of the entire country and protect the fundamental rights of the citizens thereof. There need be no fear that courts of equity will be called upon to supervise the administration of the criminal laws of the land. Experience has taught us that there can be no great danger from this source, for if the doors of a court of equity are ever open to prevent threatened injury to property rights, that fact will be appreciated by legislative and municipal authorities, and attempts to prostrate the rights of the people will not be seriously contemplated. It should be a principle of equity jurisprudence that a remedy is not to be denied, because it has never before been granted.

HENRY T. HELM,
LYNN HELM,
EDWARD C. BAILEY,
HENRY T. LEE,
J. R. SCOTT.
Solicitors for Appellant.

Supreme Court of the United States

OCTOBER TERM, 1902.

No. 507.

DAVIS & FARNUM MANUFACTURING COMPANY,
A CORPORATION, APPELLANT,

vs.

CITY OF LOS ANGELES, A MUNICIPAL CORPORATION,
APPELLEE.

REPLY BRIEF ON BEHALF OF APPELLANT.

I.

May it please your honors:

If we understand the discussion of counsel for appellee in their brief, it is apparent to us that they have misunderstood the salient points of the argument which we have presented as to the validity of the ordinance in question and the power of a court of equity upon the case disclosed by the bill of complaint to prevent the enforcement of that ordinance and enjoining the city of Los Angeles from prosecutions thereunder which would thereby result in irreparable injury. We have examined the authorities cited by the counsel for appellee in their brief as to the power of a court of equity to enjoin the enforcement of void city ordinances, and, so far

as we can determine by such investigation, the essential element is lacking in those cases, namely, *that a court of equity will enjoin the enforcement of void city ordinances to prevent a multiplicity of actions or to protect the property rights injuriously affected or impaired thereby, and where irreparable damage will follow, especially where property rights are acquired under legislative authority.*

It must be borne in mind in this case that the property rights which we are seeking to protect are those acquired by legislative authority, viz:

1st. Under the rights, privileges, and franchises granted by the constitution of the State of California, article 11, section 19, providing for the use of the public streets and thoroughfares of every city in the State of California for the purpose of laying down pipes and conduits and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gas-light or with other illuminating light.

2d. The passage by the city council of the city of Los Angeles, on the 26th day of August, 1901, of ordinance No. 6663, new series, establishing a district where, by implication, it was lawful to erect gas works, and the purchase of property by the employer of appellant in said district suitable for the erection of gas works, after the passage of such ordinance and for the purpose of conforming thereto; and,

3d. The granting by the board of fire commissioners on the 22d day of November, 1901, of a permit to erect gas works upon the premises thus acquired by the employer of appellant, the board of fire commissioners having been duly authorized to grant such permit by the city council of the city of Los Angeles by ordinance adopted pursuant to the charter of said city.

Hypothetical cases suggested by counsel for appellee, as illustrating their position, lack the essential element of property acquired under a constitutional grant and protection, as well as under a legislative grant. Slaughter-houses and gunpowder works have never been protected by constitutional provisions, and to use such objects, as counsel for appellee continually do in their argument, as illustrations of the lack of power of a court of equity and of the far-reaching effect of the police power, is a failure to present illustrations that affect the argument which we have presented to this court in our opening brief. No case will be found in which any of the enterprises and industries which have been condemned as being within the police power have been granted or protected by constitutional provisions. In this respect, gas and works for its manufacture, as incidental to the use of the public streets and thoroughfares in the cities of California, are *sui generis*.

As the same illustration of ordinances passed for the purpose of regulating the locality in which slaughter-houses and gunpowder works are erected is employed by counsel for appellee, both for the purpose of their argument as to the want of power in a court of equity to enjoin the enforcement of municipal ordinances in reference thereto and also as to the control over slaughter-houses and gunpowder works by ordinances and laws adopted under police regulations, we disclaim any contention on our part that slaughter-houses and gunpowder works, having to do with the public health and the public safety, are within the class of cases which are within the principles for which we contend. There are two essential features in our case—a void ordinance and property rights acquired under legislative authority attempted to be destroyed thereby. A hypothetical case might easily be put that would be a more fitting illustration of the questions presented by this case than those suggested by counsel for appellee. It might not concern the city of Los Angeles and its city attorney, nor disturb them in the least, as it is

apparent to this court they have little interest in this controversy, waiting and watching to finally espouse the cause of the one in which, in their opinion, as between these rival gas companies, their greatest profit lies. It can be said of them that, like their prototype in the old play by Marlowe, "And thus far roundly goes the business. Thus loving "neither, I will live with both, making a profit of my policy; "and he from whom my most advantage comes shall be "my friend." But to the other counsel in this case, as attorneys for the Los Angeles Lighting Company, the case we are about to present might arise as a hideous nightmare to disturb their equanimity and the peaceful security in which they have reposed hitherto. Their confidence could only be restored by the singular proofs which, as shown by the record in this case, the authorities of the city of Los Angeles have undoubtedly given to this Los Angeles Lighting Company of their abilities and faithful services.

Suppose that the Los Angeles Lighting Company, which, in this record, is charged with having a monopoly of the business of furnishing gas to the city and inhabitants of the city of Los Angeles, has a franchise from the city of Los Angeles acquired prior to the adoption of the present constitution of the State of California, in reference to the use of the streets of the city of Los Angeles for the purpose of laying pipes and conduits therein to supply the city and its inhabitants with gas, and in the district in which it was lawful to erect gas works had an establishment erected where it manufactured gas and stored it for the purpose of daily distribution to its customers, and under its franchise, from time to time, in said district, it erected other works necessary for that purpose, and while said works were erected and in process of erection suppose that the said council of the said city of Los Angeles had adopted the ordinance of March 3, 1902, leaving within the district the works that were being erected by appellant for the Valley Gas and Fuel Company and making it unlawful to erect gas works

Addenda.

Vide City of Hutchison vs. Beckham, 118 Fed. Rep., 399 (reported since this brief was prepared), wherein the circuit court of appeals, eighth circuit, hold that a court of equity will entertain a bill in the nature of a bill of peace to restrain the enforcement of void city ordinances where numerous prosecutions are threatened or instituted thereunder causing irreparable damage.

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south of Redondo street and Alhambra avenue instead of northeast thereof in said city, and thereby excluding the work of the Los Angeles Lighting Company, it might be interesting then to speculate what would be the position of the counsel of the Los Angeles Lighting Company under such a state of facts. That would be an illustration to the point. It would present a far different case than those suggested by slaughter-houses and gunpowder works. Could it be said that the Los Angeles Lighting Company, with its extensive works, supplying with gas, as it does, hundreds of customers absolutely in need thereof and dependent upon the service given by that company, having had a franchise from the city, could not receive protection from a court of equity, though the ordinance adopted was highly penal in its provisions and methods of enforcement? The position would be exactly similar to the case at bar, and we take it that from the authorities we have presented it could never be contended that the ordinance we have supposed to have been adopted could be sustained as a police regulation, and that it could never be maintained in this court that a court of equity was without power to grant the relief necessary to protect property rights acquired by legislative authority and to avoid a multiplicity of suits.

II.

In reference to the power of a court of equity to restrain the enforcement of invalid ordinances where property rights are involved, we desire to call the court's attention to the following extract from 21 American and English Encyclopedia of Law, 2d edition, 998:

"It has been frequently held that a court of equity may "by injunction restrain the enforcement of a municipal "ordinance, provided a proper showing be made to warrant "the extraordinary relief (citing *Cleveland City Railway Co.* "*vs. Cleveland*, 94 Fed. Rep., 385; *New Orleans Water Works*

"*Co. vs. New Orleans*, 164 U. S., 471; *Sylvester Coal Co. vs. St.*
"*Louis*, 130 Mo., 323, and other authorities cited by us in
"our opening brief); and though in many cases, injunctions
"for such purpose, have been denied, it will, as a rule, be
"found on an examination of the cases that the refusal was
"based upon the ground, not of a lack of power, but that the
"case presented was not such as to call for or warrant the
"interference of equity."

Another distinction is made between the power of a court of equity to enjoin the enforcement of criminal statutes adopted by the legislature and the power to enjoin the enforcement of municipal ordinances. In *Sylvester Coal Co. vs. City of St. Louis*, 130 Mo., 323–328, the court said:

"But is the remedy at law adequate? It must be re-
"membered that the injury complained of here is contin-
"ous. The ordinances are continuous, and plaintiffs' busi-
"ness is continuous, and under the ordinances for each
"wagon-load of coal sold and delivered in violation of the
"restrictive provisions thereof, the plaintiffs each be-
"came subject to an action in the municipal courts
"of the city for such violation. The fact that in each
"of said suits the plaintiffs might plead successfully
"the invalidity of the ordinances as a defense thereto
"does not give them an adequate remedy. They are
"entitled to be protected from the expense, vexation,
"and annoyance of such a multiplicity of suits in conse-
"quence of their continuance of a legitimate business except
"upon compliance with the conditions of ordinances which
"it is alleged are and may be utterly void (*Mayor, etc., vs.*
"*Radecke*, 49 Md., 217). * * * The doctrine that crim-
"inal statutes cannot be tested or their enforcement restrained
"in the civil courts has no application to the case. *Munici-*
"*pal ordinances, though penal, are not criminal statutes* (*City of*
"*Kansas vs. Clark*, 68 Mo., 588; *Ex parte Hallwedell*, 74 Mo.,

"395; *St. Louis vs. Marchell*, 99 Mo., 475. They are *quasi* "criminal in form, but not so regarded in procedure."

The same distinction between criminal laws adopted by the legislature of a State and municipal ordinances—the latter as being only quasi criminal, though penal in their method of enforcement—is recognized in the case of *Southern Express Co. vs. Mayor of Ensley*, 116 Fed. Rep., 756, quoted from in our opening brief, where Judge Jones says of such ordinances: They "are *quasi* penal only, at most. "In substance and legal effect, they are civil proceedings."

The counsel for appellee recognize the force of the authorities cited by us, and especially of the *City of Austin vs. Austin City Cemetery Association* (*supra*), in which case the supreme court of Texas recognized the fact that it was in direct conflict with the case of *Wardens vs. Washington*, 109 N. C., 21, quoted from by counsel for appellee, but counsel say that the case of the *City of Austin vs. Austin City Cemetery Association* is in conflict with the practice and procedure of the State of California. We do not wish any misapprehension by this court because of this statement of counsel for appellee. We know of no practice or procedure of the State of California in conflict with that case or with the principles for which we are contending. On the contrary thereof, the only case in California wherein the supreme court of the State of California have had occasion to discuss the power of a court of equity in these matters of restraining the enforcement of void municipal ordinances was the case of *Mock vs. The City of Santa Rosa*, 126 Cal., 333, 342, where Mr. Justice Temple, in delivering the opinion of the court, said:

"In this connection, appellants further contend that 'the "powers of a tax-payer plaintiff are limited and can be ex-"tended only to acts or threatened acts of municipal officers' "(citing High on Injunctions, section 1243). It is there laid "down that equitable interference by injunction with legis-"lative action by municipal bodies has given rise to some

"apparent conflict of authority, and is not wholly free from "doubt; that purely legislative action will not be enjoined. "But the authority further says: 'And while courts of equity "will not enjoin municipal bodies from the passage of ordi- "nances or resolutions, yet after the passage of such ordi- "nances or resolutions, the courts may and will, on a proper "case being shown, prevent their enforcement, and for this "purpose, may enjoin proceedings thereunder, which would "otherwise result in irreparable injury.'"

The case of *Fitz vs. McGhee*, 172 U. S., 516, cited by counsel for appellant, was a bill brought against the attorney general of the State of Alabama and the solicitor of the eleventh judicial circuit of that State to restrain them from prosecuting a large number of indictments found against the employés of the plaintiff. The real question involved in that case was whether or not it was not within the prohibition of the eleventh amendment to the Constitution of the United States, and it was determined by this court that it was a suit against the State. There was, therefore, no difference between that case and *Harkrader vs. Wadley*, 172 U. S., 148. Property rights acquired by legislative authority were not involved, and the discussion in reference to the power of a court of equity, like the discussion of that question in *Ex parte Sawyer*, *supra*, and *Harkrader vs. Wadley*, *supra*, is not applicable to the case at bar.

The case also of the *City of Denver vs. Beede*, 54 Pac., 624, decided by the supreme court of Colorado and relied upon by counsel for appellee in their reply brief, related solely to the question as to whether a court of equity would enjoin the enforcement of an ordinance prohibiting a Sunday performance in a theater. There were no property rights involved, and the ordinance certainly went to a question affecting public morals. There can be no property rights in a Sunday theatrical performance, and the case is not in conflict with the principles decided by the same court in *Platte and D.*

Canal, etc., Co. vs. Lee, Mayor, 29 Pac. Rep., 1036, quoted from at large in our opening brief.

III.

We do not agree with counsel for appellee that in arriving at a decision as to the validity of the ordinances in question this court must only consider them in connection with and look at them only in the light of those facts and circumstances which the law says the court may take judicial cognizance of; nor do we agree in any particular with counsel for appellee in the statement that this court will take judicial knowledge of the population of the city of Los Angeles, and that portions of it are devoted to residence purposes exclusively and are densely populated, or as to the extent of the district embraced in the ordinance No. 7029. This court has power to enquire with regard to the jurisdiction of the court or as to the validity of the ordinances to all matters disclosed in the record, even if such enquiry involves an examination of other facts than those disclosed on the face of the ordinance, or of which the court takes judicial notice.

While we may agree with counsel for appellee that gas is an extremely volatile, inflammable, combustible, explosive, and poisonous, yet we do not agree with counsel that it cannot be manufactured without giving forth offensive odors or noxious smoke, nor that it will affect the health and comfort of all the persons living in the immediate vicinity of the works, or that it is a menace to the buildings adjoining or in close proximity thereto It is distinctly alleged in the bill of complaint in this case that the works are being constructed and are being completed upon concrete foundations with a superstructure of brick and steel and iron of the best material procurable and are not combustible, and that the same are so firmly and substantially constructed that there can be no danger from explosion, bursting, or leakage; that

all the machinery now in place therein or to be placed therein is of the most approved pattern and constructed in accordance with the latest devices and improvements known in the manufacture of gas; that said works can and will be operated and maintained by the said Caroline W. Dobbins, by the use of said devices and improvements and the said machinery therein contained, so that there will be no leakage or escape of odors, and that the same will not create a nuisance and will not interfere with the health, comfort, safety, or welfare of the inhabitants of the district and territory in which the gas works are located, or of any other inhabitants of said city of Los Angeles. These allegations are admitted by the demurrer.

In the case of *Cleveland vs. Citizens' Gas Light Co.*, 20 N. J., Eq., 201, quoted from by counsel for appellee, the allegations of the complaint were similar to those in this case, that the process of manufacturing gas to be used was free from any objectionable characteristics. That case did not involve any municipal ordinance, for never in the history of this country, so far as we have been able to ascertain, has any municipality heretofore attempted to prevent the erection of gas works on the theory that they would be a nuisance when erected, or even to declare existing gas works a nuisance. In that case the plaintiff sought an injunction to restrain the erection of the works and also manufacturing the gas. The court said that the building itself could be an injury to no one, if gas was never made in it, and the chancellor was not entirely satisfied that it was impossible to manufacture gas in some way that would not be a nuisance to persons situated as those of the complainants. Therefore he did not feel justified in restraining the erection of the buildings, but permitted the defendants to use their own discretion in going on with them, if they chose to do so, after hearing the views entertained of the rights of the complainants and others in like situation; referring to the right to bring an action to restrain a private nuisance.

IV.

In order to justify this ordinance as a police regulation, it must have a real and substantial tendency to affect the public health, comfort, or safety of the city of Los Angeles, regardless of the manner in which the business in question is conducted. It is not sufficient that any business or occupation, if negligently managed or recklessly conducted, will injure the public health or affect the public safety and comfort. This will not justify a municipal legislative body in prohibiting that business or occupation from being properly conducted in the particular locality, for it is difficult to conceive of any business, trade, or occupation which could not be so conducted, under reckless and wanton management, as to in some degree affect the health of the public. It cannot be said that the making of gas or the storage of it regardless of the methods which are employed to guard against its escape is an occupation which should be suppressed upon the theory that it affects the health of the community. Every city in the United States of any size has within its limits a gas plant in active operation, and yet the books are silent as to a single case in which the operation of a gas plant has ever been declared to be a nuisance, public or private.

The only element of danger in the possession of illuminating gas lies in its improper or negligent use, and we submit that it is not competent to exterminate it on the supposition that the public is going to negligently and improperly use that which has grown to be one of the most essential of modern comforts and conveniences. If the public health is endangered at all by the manufacture and distribution of gas, that danger lies, not at the gas works, but in the houses through which it is distributed and where the opportunity for negligent use presents itself; and yet the constitution of the State of California, recognizing the public necessity,

confers upon appellant's employer the right to distribute gas, and thereby it deprives the municipal corporation of the opportunity to prohibit that portion of the gas business which can be said to affect even remotely the public health.

If the ordinance be justified on the ground of the safety of the public, the same considerations apply. In the history of gas-making of the United States, extending over a period of nearly one hundred years, there is not a single case on record where a gas tank or gas works have caused an explosion, and for the simple reason, of which, we think, the court may properly take judicial notice, that gas, as it is stored in the tanks of the gas companies and distributed through their mains, is absolutely non-explosive. It is inflammable, but it is for its qualities of inflammability that the constitution of the State of California protects it from just such legislation as this on the ground of public necessity for its use.

Under the head of health or comfort it is claimed that the power to prescribe the localities within which slaughter-houses and meat markets may be conducted is determinative of the validity of the ordinance under review. As to slaughter-houses, we concede that it is within the police power to absolutely prohibit their maintenance within the city. The tendency to produce disease caused by the excreta from living animals and the putrefaction of animal matter which, especially in warm climates, takes place with great rapidity would seem to create a shadowy parallel to the gas-making industry, and it is but natural that New Orleans, with her climatic conditions, should have furnished much of the law on this subject. In one of the earliest cases in Louisiana, discussing this question, the court say: "By way of illustrating this necessarily existing power to "regulate the number, location and management of markets, "take the city of New Orleans, *in a warm climate*, located in "a low district of country, surrounded by marshes and "swamps, which in the hot season under favorable condi-"tions envelops its large population in a malarious atmos-

"phere. Under such circumstances the danger of epidemics "becomes imminent. It behooves the city authorities at "such periods to be on the alert to obviate the local causes "of disease within the limits of the city. Among such "causes the decay of animal and vegetable matter is a prom- "inent one. The markets, therefore, must on that account "be strictly attended to, and such measures adopted in "regard to them as in the judgment of the proper authori- "ties the public health may require."

New Orleans vs. Stafford, 27 La. Ann., 417.

There are many cases in which the power to regulate the location of markets has been exercised in which it was undoubtedly justified on the theory that it facilitated the inspection of the food products there offered for sale. The supreme court of Michigan considered an ordinance prohibiting the establishment of markets in the city of Detroit outside of the public markets, and they say: "The power to "license and regulate the vending of meats and vegetables "is not denied, nor is its necessity questioned. The health "of the city demands that it should exist. If the power to "regulate exists, then the city has the power to prescribe the "limits within which the trade or calling shall be carried on "without a license. If carried on elsewhere the city may "require the license and bond for protection and regulation, "and may require such reasonable fee *as will compensate* "*either partially or fully for the expense of inspection and regu-* "*lation thereby incurred.*"

Ash vs. People, 11 Mich., 352.

It would seem that many of the cases outside of the Southern States which support the power to regulate markets proceed upon the theory, not that they are of themselves injurious to the public, but that for the purpose of facilitating inspection the city may group them together. The fact is also worthy of note that all of these cases concerning the

right to prescribe the locality in which meat shall be sold at retail arose years ago, when most of the cities in which the ordinances were adopted were but little larger than country villages. Were the question to be raised today as to whether or not the cities of Los Angeles or San Francisco could shut up all the meat markets outside of a given block, it might receive a very different consideration. The *reasonableness* of such a police regulation and the necessity for its passage under existing considerations would perhaps appeal so slightly to the court as to render a conclusion different from that arrived at in early cases a possibility.

"*Cessante ratione legis cessant et ipsa lex.*"

The welfare of the community embraces a large number of cases which have no application here, and which may be said to provide restrictions or regulations affecting the public morality. Under this branch of the police powers may be grouped the lottery cases, the gambling cases, the brothel cases, and the cases involving the right to carry on the liquor traffic.

The initial ordinance of August 26, 1901, is one of the most far-reaching and extreme attempts to interfere with the lawful use of property that has ever been made by any municipal council in the State of California. The antipathy to the Chinese instigated the passage of many ordinances, which culminated in the Stockton laundry ordinance case, the decision in which case was much criticised at the time, but which has since been adopted by the supreme court of California in the *Sing Lee* case, *supra*, and followed in the *Hong Wah* case, 82 Fed., 623. But this race hatred resulted in no ordinances which required the recognition of unlimited powers to control private property, as those ordinances were attempted to be justified solely on the ground of being sanitary measures. But here the city of Los Angeles is in the position of saying that it may ostensibly regulate, but in fact exterminate, a lawful industry, and one which is encouraged by the constitution of the State of

California upon the ground that the fruits of that industry, if negligently and improperly used, will result in affecting not alone the health of the person who negligently employs the product, but of the entire community, on the theory that where one is negligent all may be, and in this case will be. If this is law there is not a business or occupation carried on within the city limits, the toilers in which may be classed as "productive laborers," where the same rule would not apply. They would regulate or exterminate drug stores, grocery stores, dry-goods stores, or any other lawful business or any manufacturing establishment. Such a condition, it seems to us, would be intolerable and utterly foreign to any judicial interpretation, however liberal, of the police powers.

We do not wish to be understood by this court as asserting that the municipal council cannot provide for the use of the very latest improvements in gas-making, and compel, by any reasonable regulation, a compliance with the methods of manufacture which are employed in all modern gas works to prevent the escape of gas in any quantity whatever, or to prohibit whatever else may be obnoxious as the result of negligent management or insufficient appliances. We would be glad to have the city of Los Angeles preserve the public health and the public welfare by such an ordinance as that, and if it were made to apply to all of the existing gas plants in the city of Los Angeles we have no doubt it would do much, if uniformly enforced, to destroy the impression in the mind of our adversaries that there is any necessity whatever for making gas under the most improved methods, either by a "soulless corporation" or any one else, in such a way that any odors can escape. What we do earnestly insist is that the city of Los Angeles has not nor has the State itself power to limit our right to use property for a lawful pursuit and to engage in a lawful business of erecting gas works, and that the discriminatory character of this ordinance in prohibiting the employer of appellant,

Mrs. Dobbins, from using her property, purchased in a district devoted almost exclusively to manufacturing interests and according the coveted privilege to her neighbors a short distance away, be asserted by this court.

There is nothing, either in the constitution of the State of California or in any provision of the city of Los Angeles, granting police powers in excess of those which States or municipalities exercised prior to their respective adoption. It is noticeable that among the enumerated industries that may be regulated as police regulations under the city charter of the city of Los Angeles, which are set forth in full in appellee's brief, no mention is made of gas works or of the place in which they shall be located.

What we contend for is the very principle that distinguishes the case at bar from the reasoning in the case of *Powell vs. Pennsylvania*, 127 U. S., 68, namely, that the ordinances in question have no real or substantial relation to the public health, the public safety, the public comfort, or the public morals, and are not therefore police regulations. Instead of this court being able to determine from the face of the ordinances that they are valid as police regulations, because of affecting the public safety, or the public health, or the public comfort, there is nothing appearing on the face of the ordinances which would lead this court to any such conclusion.

V.

We are not sure that we understand counsel for appellee correctly that if this ordinance of March 3, 1902, is a valid ordinance and can be enforced against any person, that therefore the ordinance would be constitutional under all considerations and conditions; but if we do understand counsel correctly in this respect, we can only say that it would be introducing into constitutional law a somewhat novel doctrine and make every retroactive statute that did not so

appear upon its face of full force and effect unless void for some other constitutional reason. The contention of counsel simply ignores the doctrine of vested rights. Vested rights would never be apparent on the face of the ordinance or statute and not always within the range of matters of which a court could take judicial cognizance; and yet the counsel would have this court hold that because it did not appear upon the face of the ordinance or in the range of matters of which the court could take judicial cognizance, although there were vested rights acquired prior to the passage of the ordinance, that therefore the ordinance was constitutional and valid.

It must be apparent to this court that this is not a controversy altogether between the appellant and the appellee herein, but is rather a controversy between the Valley Gas and Fuel Co. and Mrs. Caroline W. Dobbins, on the one hand, and the Los Angeles Lighting Co., on the other, and that the determination by this court that the appellant herein has vested rights acquired prior to the passage of the ordinance of March 3, 1902, is the determination that the Valley Gas and Fuel Co. and Mrs. Dobbins had vested rights acquired prior to the passage of that ordinance. The appellant has an equitable interest in the vested rights granted to Mrs. Dobbins to the extent that it was carrying out the contract of erecting the gas works, and thereby was to derive the benefit and profit of its work in so doing. Profits are as much property and the right thereto as much a property right as those to be derived from the subsequent ownership and operation of the works erected under the contract. The extent of these profits is immaterial; the rights interfered with and which the appellant would be compelled to relinquish by prosecutions under an invalid ordinance are the same.

It is not clear, as claimed by counsel for appellee, that under the allegations of the bill of complaint in this case appellant can recover for work done upon the gas works prior to the enactment of the ordinance in question, or that

it can insist upon its right under its contract to erect those works in the city of Los Angeles upon premises to be designated by Mrs. Dobbins or the Valley Gas and Fuel Company where it was lawful to erect the same at the time the contract was entered into for their erection, September 17, 1901. The contract between appellant and the Valley Gas and Fuel Company and Mrs. Dobbins was entered into on the 17th day of September, 1901, with a view, as to the place of erection of said works, to the ordinances then in force in the city of Los Angeles. The contract was an entirety, and, as is alleged in the bill of complaint, payment therefor was to be made "upon the delivery of said works complete." The doctrine of the inviolability of contracts protects them against legislative assaults, whether they are entered into by the leave, license, or permission of the public authorities or not; and even without so much as notice to the public authorities that such contracts had been entered into.

In construing the doctrine of vested rights as applied to the police powers, a distinction has been recognized between those things which are nuisances, necessarily and regardless of the manner of their use and enjoyment, and, on the other hand, certain changed conditions, which may take unto themselves the character of a nuisance, and justify an immediate and drastic regulation on the part of the municipal authorities. Vested rights in those things which are nuisances *per se* can never be protected against a municipal ordinance requiring their abatement; but it has never been contended successfully that where a wooden building has been erected without a fire limits, and the municipal council later changed the district so as to include the property on which the wooden structure was erected, the authorities could compel the destruction of the building, merely because a wooden building in that locality might, in the event of a conflagration, affect the safety of the community. The owner of the wooden building, by reason of its lawful erection

under existing regulations of the municipality, acquires a vested right in its maintenance, which is subject only to the power of the city to condemn it as a nuisance, if such it becomes, or to blow it up or otherwise destroy it, should the actual necessity, by reason of a conflagration, exist. Do we not stand in the same relation to the city of Los Angeles? The city council prescribed a district within which gas works might be erected. They virtually invited us and all others who contemplated entering the business to go into that district and secure thereby the protection of the city in the prosecution of our lawful undertaking. Appellant's employers accepted the invitation, purchased land for the purpose of building a gas plant within the favored district, entered into numerous contracts on the faith of the alleged municipal ordinances as they then existed, and spent large sums of money in the prosecution of their undertaking, and then the council amended the ordinance, cutting out a suspiciously small piece in the northern end of the district, excluding from it a territory which contains many "objectionable trades," enumerated in the bill of complaint, and thereby attempted to stamp with the character of outlawry the effort of appellant's employer to supply the citizens of the city of Los Angeles with gas and to give them competition in a business which has never been determined by the courts to be in any sense noxious, offensive, or injurious to the public health.

The doctrine of vested rights as against the attempted exercise of the police power under certain conditions certainly exists, and it would be difficult to imagine a more inequitable or unconscionable condition of affairs than that a munipal legislative body should have the power to invite to their financial ruin those who are attempting to participate in the manufacture of gas. If they can amend the district once they can continue to amend it, and in that way effectually and for all time prevent any particular individual from ever entering the business.

We respectfully submit that from the mass of cases defining and limiting the scope of the police powers the principles of common honesty, common justice, and reasonableness will support the application of the vested-rights theory to the case at bar. We are not dealing in speculative theories as to the probable action of the council in the future or as to any presumption concerning their reasonable exercise of all their legislative functions, for the condition disclosed in the complaint is one which the exercise of their legislative functions has brought into existence. If their right to change the outlines of the district under this state of facts is sustained, and the future is to be judged by the past, the exterior boundaries of the limits within which gas works may be erected will become so flexible and incapable of determination as to completely deter the investment of capital in this most important industry, and it must inevitably result in vitally affecting the broader and more comprehensive interests of the public in securing competition in the supply of public utilities.

If vested rights are not to be considered, whenever municipal authorities seek to justify their action under an alleged exercise of the police power, other useful industries will be loath to enter the boundaries of municipal corporations and be subject to the tyranny of municipal authorities. One of the most useful industries in our cities of the present day is that of generating and conducting electricity to the citizens in their homes and to the public generally for power and transportation purposes. It cannot be doubted that electricity of the voltage which is ordinarily transmitted along our city streets is a highly dangerous element. Where one person is injured through inhaling gas, a hundred are instantaneously killed by the too frequent grounded circuit. If the city council of the city of Los Angeles should pass an ordinance prohibiting the generation of electricity, except within a certain district in the city of Los Angeles, would it have any substantial relation to the health or safety of the

community, and if having passed such an ordinance, assuming that it would be valid, and prospective investers should within the favored district commence the erection of a plant capable of generating electricity in large quantities, would they not have acquired vested rights which would protect them against a change in the outlines of the district? The modern gas plant is less objectionable than the large steam plants which exist in all our cities for the generation of electricity. It is certainly no more of a nuisance, and it possibly is a little less, for the reason that the modern gas plant is built for the purpose of utilizing all the products of combustion. The constitutional grant of police powers in the State of California is not sufficient to give any city power to prohibit the generation of electricity simply because the product of the efforts of those engaged therein may and in many cases does most seriously affect the health and the life of individual inhabitants of the city. We think that the manufacturers of gas are at least on the same plane with the generators of electricity; that the product of each is a necessity of modern civilization; that the municipality may regulate, by all reasonable provisions, the methods which shall be employed in furnishing the citizens with the product of their efforts to compel the use of the latest appliances and devices to secure the greatest degree of safety and comfort in their use, and to compel, in the manufacture of both gas and electricity, every safeguard known to modern science; but the city authorities have no authority in reference to either the persons generating the electricity for power or light or manufacturing gas to establish a district in which it is lawful to erect their works, invite them there to spend thousands of dollars in the erection of their establishments, and then suddenly change the boundaries of the district respecting neither vested or any other rights.

VI.

There is considerable discussion in the brief on behalf of appellee as to the validity of the permit granted to Mrs. Dobbins by the board of fire commissioners on the 22d day of November, 1901. The facts in reference to the granting of that permit are set forth in the bill of complaint. Counsel for appellee assert that the bill of complaint does not disclose the authority of the board of fire commissioners to grant the permit. The city ordinances in reference to this matter and the powers conferred upon the board of fire commissioners by their charter are set forth in our original brief, but the method of procedure before the board of fire commissioners is all set forth in the bill of complaint, and the allegation is made that the board of fire commissioners had power to grant or refuse the permit. These facts are admitted by the demurrer. The board of fire commissioners, under the building ordinances, had authority to grant the permit, and so voting to grant the permit the resolution adopted was a permit in itself.

No formal resolution of acceptance was necessary and it was not necessary to formally issue a permit after the adoption of the resolution that the permit be granted. That would simply be a ministerial act (*City Railway Co. vs. Citizens' Street Railroad Co.*, 166 U. S., 557, 568).

VII.

Much has been said by counsel for appellee in their brief as to the fact that the appellant would not suffer by the enforcement of the ordinances in question because, as they allege, the city of Los Angeles would be responsible in damages, in a suit at law, for all injuries that might be sustained by the enforcement of the ordinances if invalid, and therefore appellant has an adequate remedy at law. Counsel for appellant entirely overlook the fact that the appellant

has no remedy against the city of Los Angeles for damages, and we again call the attention of this court to the authorities that we have cited in our opening brief in support of the proposition that, in the absence of a statutory provision in the State of California imposing the liability, a municipal corporation is not liable for the misfeasance, malfeasance, or non-feasance of its officers.

VIII.

In concluding this argument we desire to lay especial stress upon the provisions of the constitution of the State of California, article XI, section 19, in reference to the use of the public streets for the purpose of supplying the cities and their inhabitants with gaslight and other illuminating light. We have presented this matter at large in our opening brief and as to what we claim were the incidental rights acquired under this provision of the constitution. The ordinances in question make it unlawful to have any tank, reservoir, or receptacle for the storage of gas in any portion of the city of Los Angeles outside of the district described in the ordinance. In this respect the ordinance is absolutely void and in contravention of this provision of the constitution of the State of California. There is more gas stored in the pipes in the street than in all the holder-room that it might be necessary for any gas company to have attempting to supply a city larger than the city of Los Angeles. The judicial interpretation of this section of the constitution of the State of California, which is sought for by counsel for appellee, is easily found in *Ex parte Johnston*, as cited and quoted largely by us in our opening brief, where the supreme court of the State of California expressly say that it is not within the power of the municipal authorities to abridge any of the rights granted thereby; nor are we confined to a strict construction of that section of the constitution which entitles us to all privileges that may by a liberal intendment be derived therefrom.

Too much stress cannot be laid upon the principles enunciated by the supreme court of the State of California in the opinion of the learned Justice Harrison in this case of *Ex parte Johnston*. Not only is the decision in that case far reaching in its effect as interpreting the provision of the constitution of the State of California now under discussion, but as determinative of the case at bar in so far as it is determined thereby that it is not within the power of the municipal authorities to curtail or abridge any of the privileges granted by that constitutional provision. Under this authority the ordinances in question are an attempt on the part of the municipal authorities of the city of Los Angeles to curtail and abridge the rights and privileges of those engaged in the gas business in that city. By the same authority these ordinances are not police regulations. They are therefore void, and their enforcement should be enjoined by a court of equity as an attempt to enforce submission to lawless demands and to compel the relinquishment of property rights by prosecutions threatened or instituted for alleged crimes under color of such invalid ordinances.

The decree of the circuit court should be reversed, with instructions to grant the preliminary injunction prayed for in the bill of complaint.

Respectfully submitted.

HENRY T. HELM,
LYNN HELM,
EDWARD C. BAILEY,
HENRY T. LEE,
J. R. SCOTT,
Solicitors for Appellant.

In the Supreme Court

OF THE

UNITED STATES,

OCTOBER TERM, 1902.

Davis & Farnum Manufacturing Company, a corporation,
Appellant,

vs.

City of Los Angeles, a municipal corporation,
Appellee.

BRIEF AND ARGUMENT ON BEHALF OF APPELLEE.

May it Please Your Honors:

This was a bill in equity, filed in the Circuit Court of the United States for the Southern District of California, Ninth Circuit, on the 6th day of March, 1902, by the Davis & Farnum Manufacturing Company, a citizen of the State of Massachusetts, against the City of Los Angeles, a municipal corporation of the State of California, praying for an injunction to restrain the City of Los Angeles and its officers from enforcing certain ordinances of the said City of Los Angeles, prohibiting the erection or maintenance of gas tanks or reservoirs within certain portions of the City of Los Angeles.

Statement of the Case.

The bill in equity, as amended, alleged substantially as follows:

That on the 28th day of December, 1899, the City of Los Angeles adopted an ordinance declaring that "it shall be unlawful for any person, firm or corporation to erect or cause to be erected, or maintain, any livery stable * * * soap factory * * * or gas works, without a permit from the Fire Commissioners so to do," which ordinance designated certain steps to be taken and things to be done by the petitioner for said permit and by the clerk of said Board of Fire Commissioners before said permit could be granted by said board.

That plaintiff Davis & Farnum Manufacturing Company was a corporation, duly organized under the laws of the State of Massachusetts; that the City of Los Angeles is a municipal corporation, duly organized under the laws of the State of California;

That on the 26th day of August, 1901, the City of Los Angeles adopted the following ordinance:

ORDINANCE No. 6663.

(New Series.)

An Ordinance prohibiting the erection or maintenance of gas works, gas tanks or reservoirs within certain portions of the City of Los Angeles.

THE MAYOR AND COUNCIL of the city of Los Angeles do ordain as follows:

Section 1. It shall be unlawful for any person, firm or corporation to erect or cause to be erected, maintain or cause to be maintained, any works, establishment or manufactory for the manufacture of gas, or any tank, reservoir or other receptacle for the storage of gas within the corporate limits of the city of Los An-

geles, outside of the limits of the district described as follows, to-wit:

Beginning at the intersection of the center line of the official bed of the Los Angeles river with the south charter boundary line of the city of Los Angeles; thence westerly along said south charter boundary line to the center line of Santa Fe avenue; thence northerly along the center line of Santa Fe avenue to the center line of Violet street; thence westerly along the center line of Violet street to the center line of Wilson street; thence northerly along the center line of Wilson street to the center line of Atlantic street; thence westerly along the center line of Atlantic street to the center line of Alameda street; thence northerly along the center line of Alameda street to the center line of Palmetto street; thence easterly along the center line of Palmetto street to the center line of Molino street; thence northerly along the center line of Molino street to the center line of Fourth street; thence easterly along the center line of Fourth street to the prolonged center line of Santa Fe Avenue; thence northerly along said prolonged center line of Santa Fe avenue to the center line of First street; thence easterly along the center line of First street to the center line of Center street; thence northerly along the center line of Center street to the center line of Aliso street; thence westerly along the center line of Aliso street to the center line of Alameda street; thence northerly along the center line of Alameda street to the center line of San Fernando street; thence easterly along the center line of San Fernando street to the center line of the official bed of the Los Angeles river; thence southerly along the official bed of the Los Angeles river to the point of beginning.

Section 2. Any person, firm or corporation who shall violate any of the provisions of this ordinance shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than one hundred dollars ($100) nor more than five hundred dollars ($500) or by imprisonment in the city jail for not less than thirty (30) days nor more than one hundred (100) days, or by both such

fine and imprisonment. Every day that such gas works, tank or reservior is maintained in violation of the provisions of this ordinance, shall be deemed a separate offense within the meaning of this ordinance.

Section 3. Ordinance No. 174, approved July 2nd, 1885, and all other ordinances or parts of ordinances in conflict herewith are hereby repealed.

Section 4. The city clerk shall certify to the passage of this ordinance and cause the same to be published once in The Los Angeles Daily Journal and thereupon and thereafter it shall take effect and be in force.

I hereby certify that the foregoing ordinance was adopted by the council of the city of Los Angeles at its meeting of August 26th, 1901.

C. H. HANCE, *City Clerk.*

Approved this 26th day of August, 1901.

M. P. SNYDER, *Mayor.*

That on or about the first day of September, 1901, one Caroline W. Dobbins, a citizen and resident of Los Angeles, California, made a contract with the Valley Gas and Fuel Company, a corporation, organized under the laws of the State of California, employing said Valley Gas and Fuel Company to build and erect for her certain gas works, including all things necessary for the manufacture, recovery and storage of gas, the said gas works to be built and erected in Los Angeles city, on premises thereafter to be designated by said Caroline W. Dobbins;

That on the 17th day of September, 1901, at Waltham, Massachusetts, the Davis & Farnum Manufacturing Company made a contract with the Valley Gas and Fuel Company to build and erect in the City of Los Angeles, on premises thereafter to be designated by Caroline W. Dobbins, certain portions of said gas works, to wit, a water tank *and a gas holder*

having a capacity of 100,000 *cubic feet of gas,* for which work the Valley Gas and Fuel Company were to pay the Davis & Farnum Manufacturing Company $13,685, upon the delivery of said works complete;

That immediately thereafter the Davis & Farnum Manufacturing Company constructed and prepared the material necessary for the erection of said work, and shipped the same to Los Angeles, California;

That on the 28th day of September, 1901, Caroline W. Dobbins, for the purpose of erecting her said gas works, purchased certain property situated in Los Angeles city, and known as Lots 16, 17 and 18, in Block 2 of Pomeroy & Mills' Subdivision of the Hollenbeck Tract; that said lots were within the limits where it was lawful to erect gas works as described in Ordinance No. 6663 (New Series), adopted August 26th, 1901; that on the 1st of November, 1901, Mrs. Dobbins applied to the Board of Fire Commissioners for a permit to erect gas works on said lots 16, 17 and 18, in Block 2 of Hollenbeck Tract, and that she complied with all the provisions of the ordinance of December 28th, 1899;

That on the 22nd day of November, 1901, said petition for a permit came on regularly for hearing before the Board of Fire Commissioners of said city, consisting of five members—Messrs. Webb, Vickery, Frankenfield, Kuhrts and Mayor Snyder; that after proof had been made that all the provisions of the ordinance of December 28, 1899, had been complied with, it was moved that the permit be granted, and Messrs. Webb, Vickery and Frankenfield voted aye, and Commis-

sioner Kuhrts voted no; that thereupon, and after said vote was announced, Commissioner Kuhrts changed his vote from no to aye, and gave notice that on the next meeting of the board, to wit, on the 29th of November, 1901, he would move to reconsider the motion; and thereafter, on the 29th of November, 1901, at the regular meeting of said Board of Fire Commissioners, Commissioner Kuhrts moved to reconsider the motion of the last meeting; that on said motion to reconsider Messrs. Webb, Vickery and Frankenfield voted no, and Commissioner Kuhrts and Mayor Snyder voted aye;

That on 22nd day of November, 1901, and immediately after the vote of the Board of Fire Commissioners, Mrs. Dobbins made contracts with various persons for the erection of various portions of the aforesaid gas works on Lots 16, 17 and 18, of Block 2 of Pomeroy & Mills' Subdivision aforesaid;

That upon said 22nd of November, 1901, said persons began to lay the foundation for said works, which were of great strength, and cost upwards of $2500.00, and that if said foundations should have to be destroyed or removed, it would cause irreparable damage and injury to Mrs. Dobbins, the Valley Gas and Fuel Company and to the Davis & Farnum Manufacturing Company;

That on November 25 the City of Los Angeles adopted an ordinance in words and figures as follows:

ORDINANCE No. 6779.
(New Series.)

An Ordinance amending Ordinance No. 6663, New Series, entitled "An Ordinance prohibiting the erection or maintenance of gas works, gas tanks or reservoirs within certain portions of the City of Los Angeles," approved August 26, 1901, by amending Section 1 of said Ordinance.

THE MAYOR AND COUNCIL of the City of Los Angeles do ordain as follows:

Section 1. That Section 1 of Ordinance No. 6663, New Series, entitled "An Ordinance prohibiting the erection or maintenance of gas works, gas tanks, or reservoirs within certain portions of the City of Los Angeles," approved August 26th, 1901, be and the same is hereby amended to read as follows:

Section 1. It shall be unlawful for any person, firm or corporation to erect or cause to be erected, maintain or cause to be maintained any works, establishment or manufactory for the manufacture of gas, or any tank, reservoir or other receptacle for the storage of gas within the corporate limits of the City of Los Angeles, outside of the limits of the district described as follows, to wit:

Beginning at the intersection of the center line of the official bed of the Los Angeles river with the south charter boundary line of the City of Los Angeles; thence westerly along said south charter boundary line to the center line of Santa Fe avenue; thence northerly along the center line of Santa Fe avenue to the center line of Violet street; thence westerly along the center line of Violet street to the center line of Wilson street; thence northerly along the center line of Wilson street to the center line of Atlantic street; thence westerly along the center line of Atlantic street to the center line of Alameda street; thence northerly along the center line of Alameda street to the center line of Palmetto street; thence easterly along the center line of Palmetto street to the center line of Molino street; thence northerly along the center line of Molino street to the center line of Fourth street; thence easterly along the center line of Fourth street

to the prolonged center line of Santa Fe avenue; thence northerly along said prolonged center line of Santa Fe avenue to the center line of First street; thence easterly along the center line of First street to the center line of Center street; thence northerly along the center line of Center street to the center line of Aliso street; thence westerly along the center line of Aliso street to the center line of Alameda street; thence northerly along the center line of Alameda street to the center line of San Fernando street; thence southeasterly following the line of the Southern Pacific Railway on Redondo street and Alhambra avenue to the official bed of the Los Angeles river; thence southerly along the official bed of the Los Angeles river to the point of beginning.

Section 2. The City Clerk shall certify to the passage of this Ordinance and shall cause the same to be published once in The Los Angeles Daily Journal, and thereupon and thereafter it shall take effect and be in force.

That since the 22nd of November, 1901, and until the 25th day of February, 1902, Caroline W. Dobbins, the Valley Gas and Fuel Company and the Davis & Farnum Manufacturing Company were peaceably engaged in the erection of gas works on said Lots 16, 17 and 18, Block 2 of Pomeroy & Mills' Subdivision aforesaid;

That on the 25th of February, 1902, the City of Los Angeles, combining and confederating with one James R. C. Burton and various persons, caused certain of the employees of the Valley Gas and Fuel Company, who were at work in erecting said gas works, to be arrested on a complaint charging them with a violation of Ordinance No. 6779 aforesaid;

That on the 1st day of March, 1902, the City of Los Angeles, again combining and confederating with

one James R. C. Burton and various other persons, instituted a criminal proceeding against certain employees of the Valley Gas & Fuel Company, and caused them to be arrested upon a complaint charging them with violating the provisions of Ordinance No. 6779 (New Series) of the City of Los Angeles;

That again, on March 1st, 1902, the City of Los Angeles, combining and confederating with said James R. C. Burton and various other persons, instituted another criminal proceeding in the police court of Los Angeles city against certain employees of the Valley Gas and Fuel Company and certain employees also of the Davis & Farnum Manufacturing Company, and caused them to be arrested upon a criminal complaint, charging them with a violation of Ordinance No. 6779 (New Series) of the City of Los Angeles;

That, on the 3rd of March, 1902, the City of Los Angeles adopted Ordinance No. 7029 (New Series) of which the following is a copy:

ORDINANCE No. 7029.
(New Series.)

An Ordinance amending Ordinance No. 6663, New Series, entitled, "An Ordinance prohibiting the erection or maintenance of gas works, gas tanks or reservoirs within certain portions of the City of Los Angeles," approved August 26, 1901, by amending section 1 of said Ordinance.

THE MAYOR AND COUNCIL of the city of Los Angeles do ordain as follows:

Section 1. That section 1 of Ordinance No. 6663, New Series, entitled, "An Ordinance prohibiting the erection or maintenance of gas works, gas tanks or reservoirs within certain portions of the City of Los Angeles," approved August 26, 1901, be and the same is hereby amended to read as follows:

Section 1. It shall be unlawful for any person, firm or corporation to erect or cause to be erected, maintain or cause to be maintained, any works, establishment or manufactory for the manufacture of gas; or any tank, reservoir or other receptacle for the storage of gas within the corporate limits of the city of Los Angeles, outside of the limits of the district described as follows, to-wit:

Beginning at the intersection of the center line of the official bed of the Los Angeles river with the south charter boundary line of the city of Los Angeles; thence westerly along said south charter boundary line to the center line of Santa Fe avenue; thence northerly along the center line of Santa Fe avenue to the center line of Violet street; thence westerly along the center line of Violet street to the center line of Wilson street; thence northerly along the center line of Wilson street to the center line of Atlantic street; thence westerly along the center line of Atlantic street to the center line of Alameda street; thence northerly along the center line of Alameda street to the center line of Palmetto street; thence easterly along the center line of Palmetto street to the center line of Molino street; thence northerly along the center line of Molino street to the center line of Fourth street; thence easterly along the center line of Fourth street to the prolongation southerly of the center line of Santa Fe avenue; thence northerly along said prolonged center line of Santa Fe avenue and along the center line of Santa Fe avenue to the center line of First street; thence easterly along the center line of First street to the center line of Center street; thence northerly along the center line of Center street to the center line of Aliso street; thence westerly along the center line of Aliso street to the center line of Alameda street; thence northerly along the center line of Alameda street to Main street; thence along Main street to the intersection of Main and San Fernando streets; thence northeasterly along the center line of San Fernando street to the center line of Redondo street; thence southeasterly, following the line of the Southern Pacific railway on Redondo street and Alhambra avenue to the official bed of the Los

Angeles river; thence southerly along the official bed of the Los Angeles river to the point of beginning.

The avenue designated herein as Santa Fe avenue, is the avenue lying in the district bounded by the Los Angeles river on the east and Alameda street on the west, and extending in a northerly and southerly direction between these two lines.

Section 2. The city clerk shall certify to the passage of this ordinance and shall cause the same to be published once in the Los Angeles Daily Journal, and thereupon and thereafter it shall take effect and be in force.

I hereby certify that the foregoing ordinance was adopted by the council of the city of Los Angeles at its meeting of March 3rd, 1902.

C. H. HANCE, *City Clerk.*

Approved this 3rd day of March, 1902.

M. P. SNYDER, *Mayor.*

That since the adoption of said Ordinance No. 7029 (New Series) the city, again conspiring with James R. C. Burton and various other persons, has instituted another criminal proceeding in the said police court against certain employees of the Valley Gas and Fuel Company and of the Davis & Farnum Manufacturing Company, and caused them to be arrested upon a criminal complaint charging them with a violation of said Ordinance No. 7029 (New Series);

That the City of Los Angeles threatens that if the Davis & Farnum Manufacturing Company continues to carry on the work of erecting gas works on said lots 16, 17 and 18 in block 2 of Pomeroy & Mills Subdivision aforesaid that it will arrest all persons employed by said Davis & Farnum Manufacturing Company and engaged upon said gas works until it will stop the business of said Davis & Farnum Manufactur-

ing Company in erecting said gas works, and prevent it from carrying out its contract made with the Valley Gas and Fuel Company, at Waltham, Massachusetts, as aforesaid;

Appellant's bill in equity still further alleges that the gas works are in an incomplete condition and exposed to the elements and are in danger of being destroyed by the elements and that the Davis & Farnum Manufacturing Company have expended upwards of $8000 upon said works;

That the said Davis & Farnum Company have brought skilled laborers and mechanics from the East to erect said works and that they cannot secure like men again;

The bill further alleges that in the neighborhood where said gas works are being erected there is a wool-pulling factory, a soap factory and various other institutions of a like nature;

That the City of Los Angeles vexed, annoyed and harrassed Caroline W. Dobbins by compelling her to get a permit from the Street Superintendent of said city and compelling her to make oath that the gas she intended to supply to the City of Los Angeles was for illuminating purposes only, before she should be permitted to use the streets for the laying of pipes, etc.;

That the City of Los Angeles, its agents, officers and common council were in all their acts and doing aforesaid unlawfully instigated, advised and controlled by the officers, agents and attorneys of the Los Angeles Lighting Company, a California corporation engaged

in supplying gas to the citizens of Los Angeles City, and that said Los Angeles Lighting Company has enjoyed a monopoly of the gas business in the said city for the last ten years;

That all the aforesaid ordinances were adopted by the common council of Los Angeles City at the instigation of said Los Angeles Lighting Company; that said gas works are being built of the best material and in the most approved manner and so that they will not become a nuisance; that the aforesaid acts of the City of Los Angeles has caused the Davis & Farnum great and irreparable damage, loss and injury;

That ordinances Nos. 6779 and 7029, are void and invalid;

First—Because they are uncertain and unreasonable.

Second—Because they impair vested rights acquired by Mrs. Dobbins and the Davis & Farnum Manufacturing Company prior to the adoption of said ordinances, and are in violation of the provisions of the Constitution of the United States prohibiting the passing of any law impairing the obligation of contracts

Third—Because they are in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States in that they abridge the privileges and immunities of citizens of the United States, and are intended to deprive the plaintiff of its property without due process of law and to foster a monopoly, and to deny to all persons within the jurisdiction of the City of Los Angeles the equal protection of the laws.

The prayer is for a temporary injunction restrain-

ing the City of Los Angeles from enforcing the ordinances complained of, and that upon the final hearing the city may be perpetually enjoined from enforcing said ordinances.

Defendants demurred to the bill on the grounds, among others, that it appeared from the bill that the complainant was not entitled to the relief prayed for or to any relief, and that the Circuit Court had no jurisdiction of the subject matter of the bill, or of the person of the defendant.

On the hearing by the Circuit Court, the demurrer to the bill was sustained, the motion for a temporary injunction was denied and the bill was dismissed.

From the said order and decree this appeal has been taken.

BRIEF.

I.

A court of equity has no power to interfere with the enforcement of criminal laws.

Ex parte Sawyer, 124 *U. S.* 200-225.
Suess v. Noble, 31 *Fed. Rep.* 855.
Hemsley v. Myers, 45 *Fed. Rep.* 286.
Fitts v. McGhee, 172 *U. S.* 528.
Minneapolis Brewing Co. v. McGillivray, 104 *Fed. Rep.* 259.

II.

A bill in equity will not lie to restrain prosecutions under a municipal ordinance upon the mere ground of its alleged invalidity.

City of Denver v. Beede, 54 *Pac. Rep.* 624.

Wardens of St. Peter's Episcopal Church v. Town of Washington, 13 *S. E. Rep.* 700.

State v. Wood, 56 *S. W. Rep.* 477.

Crighto v. Dahmer, 21 *L. R. A.* 84.

Wolfe v. Burke, 56 *N. Y.* 115.

Wallack v. Society, 67 *N. Y.* 28.

West v. Mayor, 10 *Paige* 539.

City of Bainbridge v. Reynolds, 111 *Ga.* 758

Mayor v. Patterson (*Ga.* 1900) 34 *S. E.* 600.

III.

The cases relied upon by appellant are not in point, or have been overruled.

Stone v. Mississippi, 101 *U. S.* 814.

Fitts v. McGhee, 172 *U. S.* 528.

Hemsley v. Myers, 45 *Fed.* 283

Davis & Farnum Mfg. Co. v. City of Los Angeles, 115 *Fed. Rep.* 537, and cases therein cited.

IV.

The enactment of ordinance No. 7029 (New Series) is fully within the police powers delegated to the City of Los Angeles by the state.

Constitution of California, Art XI, Sec. 11.

Charter of Los Angeles, Art. I, Sec. 2; Art. III, Sec. 27-40, *Stats.* 1889, *p.* 458.

Dillon Municipal Corporations, 4th Ed., Vol. 1, *Secs.* 141 *and* 400.

Butchers' Union, etc., v. Crescent City, 111 U. S. 746.

Slaughter House Cases, 16 *Wall.* 62.

V.

The City of Los Angeles, under its police power, was authorized to enact and enforce ordinance No. 7029, irrespective of the question as to whether or not gas works are a nuisance *per se*.

Ex parte Schrader, 33 *Cal.* 283.

Ex parte Lacy, 108 *Cal.* 326.

Ex parte Heilbron, 65 *Cal.* 609.

Canfield v. U. S., 167 *U. S.* 518.

Crowley v. Christensen, 137 *U. S.* 87.

Barbier v. Connolly, 113 *U. S.* 27.

Hing v. Crowley, 113 *U. S.* 703.

Cleveland v. Gaslight, etc., 20 *N. J.* 201.

Dillon Mun. Corp., 4th *Ed.*, *Vol.* 1, *p.* 216, 472.

Ex parte Byrd, 4 *Am. St. Rep.* 328.

Welch v. Hotchkiss, 12 *Am. Rep.* 385.

Cronin v. People, 37 *Am. Rep.* 564.

Milne v. Davidson, 16 *Am. Dec.* 189.

Milwaukee v. Gross, 91 *Am. Dec.* 472.

Tiedeman Police Powers, *Vol.* 2, *p.* 740.

VI.

The court in determining the validity of this ordinance can take into consideration only the face of the

ordinance and such facts as the court takes judicial cognizance of.

Powell v. Commonwealth of Pa., 127 *U. S.* 678, and cases therein cited.

VII.

A municipality can not give, grant, barter away or part with its right to exercise the police power delegated to it by the state.

Cooley Cons. Lim., 6 *Ed.*, *p.* 341.

Russell Police Powers, *p.* 88.

Davenport v. City of Richmond, 81 *Va.* 636.

Newton v. City of Galveston, 13 *S. W. Rep.* 368.

Butchers' Union v. Crescent City, 111 *U. S.* 746.

Northwestern Fertilizing Co. v. Hyde Park, 97 *U. S.* 659.

VIII.

All interests in property and rights in contracts, whether vested or not, are acquired and held by individuals and corporations subject to the right of the state and municipality to exercise their "police power" for the protection of the lives, health, safety and comfort of their citizens.

2 *Story Cons.*, *Sec.* 1954.

Cooley Cons. Lim., *6th Ed.* 707.

Mugler v. Kansas, 123 *U. S.* 669.

Com v. Alger, 7 *Cush.* 96.

Corporation of Knoxville v. Bird, 12 *B. J. Lea.* 121.

City of Salem v. Maynes, 123 *Mass.* 372.

City of New Orleans v. Stafford, 21 *Am. Rep.* 563.

Barbier v. Connolly, 113 *U. S.* 27.

Cleveland v. Citizens' Gas Light Co., 20 *N. J. Eq.* 206.

IX.

The allegations in appellants' bill, as to the unreasonableness of this ordinance, are not sufficient to justify this court in declaring the ordinance void on the ground that it is unreasonable.

Barbier v. Connolly, 113 *U. S.* 27.

Hing v. Crowley, 113 *U. S.* 703.

Slack v. Jacob, 8 *W. Va.* 612.

Waltman v. Philadelphia, 33 *Pa. St.* 212.

Munn v. Illinois, 94 *U. S.* 113.

Darnelly v. Cabanns, 52 *Ga.* 212.

Wells v. Mayor, 43 *Ga.* 67.

State v. Schlenker, 51 *L. R. A.* 351.

People v. Cipperly, 4 *N. E.* 108.

In re Wilshire, 103 *Fed. Rep.* 620.

City of Newton v. Joyce, 166 *Mass.* 83.

Harmon v. City of Lewiston, 46 *Am. St. Rep.* 893.

Cooley Cons. Lim., 5*th Ed.* 222.

ARGUMENT.

The first question that presents itself to us upon the argument of this case is:

HAS A COURT OF EQUITY THE POWER, UNDER THE FACTS SET OUT IN THE BILL, TO RESTRAIN AND ENJOIN THE CITY OF LOS ANGELES FROM ENFORCING ORDINANCE NO. 7029?

Counsel for appellant admit that as a general proposition of law a court of equity has no power to enjoin the enforcement of criminal laws, but they lay much stress upon the principle, enunciated in the case of Central Trust Company v. Citizens St. R. Co., 80 Fed. 225, that

"A court of equity has power to restrain by injunction a municipality from instituting criminal proceedings when such prosecutions are threatened under color of an invalid ordinance for the purpose of compelling the relinquishment of a property right."

Our contention is that the Circuit Court, sitting as a court of equity, had no power under the allegations set out in the bill to enjoin the City of Los Angeles from arresting and prosecuting the employes of the Davis & Farnum Company for violating the ordinance in question.

Before presenting the authorities in support of our contention, it will be well to inquire and ascertain from the bill just what the property rights of appellant are which it claims the City of Los Angeles *"is seeking to compel it to relinquish by threats of prosecution under*

an invalid ordinance." We have examined the bill carefully and the only ***property right*** of appellant that we can find asserted in the whole bill is its property in a certain contract alleged to have been made at Waltham, Massachusetts, on the 17th day of September, 1901, whereby appellant was employed by the Valley Gas and Fuel Company to erect certain portions of a gas works in the City of Los Angeles on premises thereafter to be designated by one Caroline W. Dobbins.

The right to carry out this contract and collect the price agreed to be paid to it under said contract upon completion of said work is absolutely the only property right and interest of appellant that is involved in this controversy.

We maintain that this contract was entered into by the appellants with the full knowledge that the City of Los Angeles had the right under its *police powers* to regulate the erection of gas works within its territory, and to prescribe limits wherein said works could be erected and to prohibit their erection outside of said prescribed limits, and under its *police powers* to change and alter said limits whenever it chose so to do. We contend that the right of either party to carry out this contract was subject to the exercise of the *police powers* of the municipality. The rights of both parties were subordinate to the rights of the City of Los Angeles to provide for and protect the health, safety and comfort of its citizens.

Under its contract the Davis & Farnum Manufacturing Company could not be compelled by the Valley Gas

and Fuel Company to erect gas works in any portion of the city where by ordinance it was unlawful to erect such works.

The Valley Gas and Fuel Company when it directed the appellant to erect the gas works on the premises set out in the bill did so with the full knowledge that the city had the right at any time under its *police powers* to prohibit the erection of such works on said premises and stop the erection of said works at any period of their construction.

In order to make this contention clear, let us put a suppositious case:

Suppose that the City of Washington had no police regulation with reference to the erection of slaughter houses or powder magazines, and that A contracts with B to build for the latter a powder magazine or slaughter house in the most thickly settled portion of said city. Would anyone contend that A did not enter into the contract with full knowledge that the city had a right at any time to prohibit the erection of such buildings in such districts, or that the city could not stop the erection of said buildings at any stage of their construction? Or can it be reasonably contended that A would suffer irreparable damage or injury if after he had begun the erection of said slaughter house or powder magazine the city should adopt an ordinance prohibiting the erection of such building in such thickly inhabited portions of the city? Or does any lawyer doubt that A would be able to recover from B for such work as he did in erecting such buildings prior to the time of the enactment of the prohibitory ordi-

nance? So we claim that in this case appellant has not suffered and will not suffer any irreparable damage or injury by reason of the enactment and threatened enforcement of ordinance No. 7029 (New Series) of Los Angeles City. It is clear that appellant can recover for work done upon said gas works prior to the enactment of said ordinance and that it can insist upon its right under its contract to erect said works in the City of Los Angeles upon premises to be designated by Mrs. Dobbins or the Valley Gas and Fuel Company, where it is lawful to erect the same. Under the allegations of the bill we can see no irreparable injury, nor, indeed, any injury that appellant will or can suffer by the enforcement of this ordinance. It would seem a monstrous proposition to say that A by contracting with B today to build ten years hence a slaughter house for B at a certain point in this city could when the ten years had elapsed enjoin the city from passing and enforcing an ordinance forbidding the erection of slaughter houses in said district, on the ground that the enforcing of such ordinance would destroy a property right of A under his contract with B. And yet when narrowed down, that is precisely the contention of appellant in this case. If such were the law, two men, one contracting to build at a future time wooden houses in certain portions of the city, at such places as should be designated by the other, might indefinitely prevent the city from establishing fire limits including such points. We cannot believe that such is the law of the land.

A COURT OF EQUITY HAS NO POWER TO INTERFERE WITH THE ENFORCEMENT OF CRIMINAL LAWS.

In support of this proposition we beg to cite the following authorities. In the hope of facilitating the examination of the authorities cited by us, we have quoted very freely from them, and have taken the liberty of italicising those portions which elucidate the points upon which we specially rely.

"Under the Constitution and laws of the United "States, the distinction between common law and "equity, as existing in England at the time of the "separation of the two countries, has been maintained, "although both jurisdictions are vested in the same "courts. (*Fenn v. Holme*, 62 *U. S.* 21 *How.* 481, "484-487 (16:198-200); *Thompson v. Central Ohio "R. R. Co.* 73 *U. S.* 6 *Wall.* 134 (18:765); *Heine v. "Levee Comrs.*, 86 *U. S.* 19 *Wall.* 655 (22:223).)

"The office and jurisdiction of a court of equity, un-"less enlarged by express statute, are limited to the "protection of rights of property. *It has no jurisdic-"tion over the prosecution, the punishment or the par-"don of crimes or misdemeanors,* or over the appoint-"ment or removal of public officers. *To assume such "a jurisdiction, or to sustain a bill in equity to restrain "or relieve against proceedings for the punishment of "offenses,* or for the removal of public officers, *is to in-"vade the domain of the courts of common law,* or of "the executive and administrative department of the "government. . . . . .

"From long before the Declaration of Independence "it has been settled in England that a bill to stay crim-"inal proceedings is not within the jurisdiction of the "court of chancery, whether those proceedings are by "indictment or by summary process.

"Lord Chief Justice Holt, in declining upon a motion "in the Queen's Bench for an attachment against an "attorney for professional misconduct, to make it part "of the rule to show cause that he should not move for

"an injunction in chancery in the meantime, said: "'*Sure, chancery would not grant an injunction in a "criminal matter under examination in this court; and "if they did, this court would break it, and protect any "that would proceed in contempt of it.*' (*Holderstaffe "v. Saunders, Cas. temp. Holt.* 136; *S. C.* 6 *Mod.* 16.)

"Lord Chancellor Hardwicke, while exercising the "power of the court of chancery, incidental to the dis- "position of a case pending before it, of restraining a "plaintiff, who had by his bill submitted his rights to "its determination, from proceedings as to the same "matter before another tribunal, either by indictment "or by action, asserted in the strongest terms the want "of any power or jurisdiction to entertain a bill for an "injunction to stay criminal proceedings, saying: 'This "court has not originally, and strictly, any restraining "power over the criminal prosecutions;' and again: "'This court has no jurisdiction to grant an injunc- "tion to stay proceedings on a mandamus; nor to an "indictment; nor to an information; nor to a writ of "prohibition, that I know of.' * * * * * *

"The modern decisions in England, by eminent "equity judges, concur in holding that a court of chan- "cery has no power to restrain criminal proceedings, "unless they are instituted by a party to a suit already "pending before it, and to try the same right that is in "issue there." * * * * * *

"Mr. Justice Story, in his Commentaries on Equity "Jurisprudence, affirms the same doctrine. Story, Eq. "Jur. Sec. 893. *And in the American courts, so far "as we are informed, it has been strictly and uniformly "upheld, and has been applied alike whether the prose- "cutions or arrests sought to be restrained arose un- "der statutes of the state, or under municipal ordi- "nances.*" . . . . . .

Ex parte Sawyer, 124, U. S. Sup. Ct. Rep. 200-225.

We desire also to cite the case of Suess v. Noble *et al.*, 31 Fed. Rep. 855. The facts in that case, as stated by the court, were as follows:

"Lewis Suess now presents his petition to this "court against the above-named defendants and others, *"alleging that they are engaged in commencing and "carrying on many criminal prosecutions against him* "before certain justices of the peace 'for each separate "sale of beer at his brewery,' and that they propose 'to "place him on trial and find him guilty of selling in- "toxicating liquors, and to impose upon him heavy "fines for said alleged offenses,' etc. He also states, "in a supplemental petition, that he was indicted at "the January term of the District Court of said county "for the alleged crime of causing a nuisance by the "sale of beer at his brewery; that he was convicted of "said alleged offense, and that he has taken an appeal "to the Supreme Court of Iowa upon the federal ques- "tion as to the constitutionality of the prohibitory law, "etc. The prayer of his petition is that this court issue "an injunction restraining said defendants from the "prosecution of said criminal suits in violation of his "rights respecting the subject-matter of the action now "pending in this court until the final determination of "the same."

The court, in rendering its opinion, says:

"Thus the proceeding now before me is in the na- "ture of an application to restrain the defendants by "injunction from the prosecution of sundry criminal "proceedings against the plaintiff under the prohibitory "law. *It is alleged, and no doubt truly, that if the de- "fendants be permitted to vex and pursue the plaintiff "with numberless criminal prosecutions before justices "of the peace and other state tribunals, the plaintiff will "be compelled to abandon his business, and that his "brewery property will be rendered useless and value- "less.* We are thus brought face to face with the ques- "tion whether or not a court of equity has any power "to interfere, by injunction or otherwise, with the en- "forcement of the criminal laws of the state.

* * * * * * * * *

"That no such power exists,—that its exercise has "been denied in both England and this country for "centuries,—is beyond question. This will be placed

"beyond all doubt by the authorities cited below. Who-
"ever will for a moment consider the nature and
"grounds of equity jurisdiction will not fail to see in-
"superable objections to the exercise of any restrain-
"ing power whatever in equity over the course of crim-
"inal proceedings. *The fundamental doctrine of*
"equity jurisdiction is that it can proceed only where
"there is no plain, adequate and complete remedy in
"the courts of common law. This principle is coeval
"with the system of equity itself. It was always upon
"this ground that the courts of equity in England as-
"sumed jurisdiction in civil causes. The principle was
"enacted into positive law by the congress of the
"United States in the judiciary act of 1793, (1 St. at
"Large, 82). It is re-enacted in Rev. St. Sec. 723, in
"these words: *'Suits in equity shall not be sustained*
"in either of the courts of the United States in any
"case where a plain, adequate and complete remedy
"may be had at law.'

"Upon what grounds, then, do courts of equity as-
"sume jurisdiction in any case whatever? It is upon
"the ground that no adequate remedy at law exists, and
"that injustice would be done if the court of equity did
"not interfere to give a better remedy than the courts
"of the common law are, by their very constitution,
"competent to administer. It would therefore be pre-
"posterous for equity to assume jurisdiction, and es-
"pecially to interfere with actual proceedings at law,
"in cases where a court of equity is utterly incompe-
"tent to give any remedy whatever. For a court of
"equity to interfere by staying proceedings at law,
"where there is some remedy, however imperfect, and
"then stand paralyzed and utterly impotent to remedy
"the assumed evil and injustice, would be the very
"height of legal absurdity. * * * * * *

"Again, public offenses are prosecuted in England
"in the name of the king, and in the United States in
"the name of the state. It is manifest that neither the
"king nor the state could be made a defendant to a
"bill in equity. The restraining power of the court
"would be futile as against them; and it would avail
"nothing for the court to address its restraining pro-

"cess to public and private prosecutors, even if the "power to do so existed, since the state would readily "find other agents to represent it in the criminal pro- "ceedings. *Courts of equity, therefore, deal only with "civil and property rights. They have no jurisdiction "to give relief in criminal cases, and they will not, "therefore, interfere by injunction with the course of "criminal justice.* (*Kerr v. Corporation of Preston*, 6 "*Ch. Div.* 463; *Saull v. Browne*, 10 *Ch. App.* 64; "*Moses v. Mayor*, 52 *Ala.* 198; *Joseph v. Burk*, 46 *Ind.* "59; *Gault v. Wallis*, 53 *Ga.* 675.)

"In Holderstaffe v. Saunders, 6 Mod. 16, Lord Holt "is reported to have said: 'Surely chancery will not "grant an injunction in a criminal matter under ex- "amination in this court, and that if they did this court "would break it, and protect any that would proceed "in contempt of it.' Montague v. Dudman, 2 Ves. Sr. "398. See, particularly, what the great equity judge, "Lord Hardwicke, says in this case. See, upon this "subject, High, Inj. Sec. 68, where the cases are col- "lected and cited.

Suess v. Noble, 31 Fed. 855.

The case of Hemsley v. Myers, Welch *et al.*, 45 Fed. Rep. 283, was a case where Hemsley filed a bill in equity in Circuit Court, praying for an injunction restraining the Sheriff, District Judge and County Attorney of Riley county, Kansas, from arresting or prosecuting him for a violation of a penal statute of the state of Kansas. Hemsley alleged in his bill that the threatened arrests were for the purpose of vexing and harrassing him and to injure and destroy his business, and that if said threatened prosecutions were instituted against him they would injure and destroy his business and work him irreparable damage and injury; the bill further alleged that the said penal statute of Kansas was void and invalid because in conflict with

the Constitution of the United States. The allegations as to damage and destruction of property rights and the invalidity of the statute are very similar to the allegations with reference thereto in the bill on file in the case at bar.

The following is the decision of Judge Caldwell in the case of Hemsley *et al.* v. Myers, Welch *et al.*

"The bill is bad on three grounds.

"1. Viewed in the light of a bill for an injunction "to restrain the violation of a constitutional or com-"mon-law right, or the commission of a trespass, it "fails to state a case cognizable in equity. The com-"plainants own no property, and have no property "rights to be affected. The owners of the liquor and "the house in which it was sold are not parties to the "suit. *The gravamen of the bill, so far as relates to "the complainant Hemsley, is that the alleged illegal "acts of the defendants will have the effect to throw "him out of his employment as agent for a Missouri "firm for selling packages of beer and pint bottles of "whiskey at Manhattan, Kansas.* * * * * * *

"The bill alleges that the sales made by the "complainant Hemsley, as agent, in this business, be-"tween the 21st day of June and the 3rd day of July, "1890, amounted 'in the neighborhood of $300 * * " * at wholesale prices.' It is not stated in the bill "whether the plaintiff Hemsley was compensated for "his services as agent by commissions on his sales or "was paid a fixed sum as wages. *The allegation in "the bill that he will sustain 'irreparable damage' is "the statement of a legal conclusion. The court will "look back of that averment to the facts, and deter-"mine from them, for itself, whether the damage is "irreparable.* By the term 'irreparable injury' is meant "a grievous one, not adequately reparable by damages "at law. *A man who has a full and complete remedy "at law to recover the damages he suffers cannot be "heard to say that the damage is irreparable.* It is ob-"vious that Hemsley can be fully and completely com-

"pensated *for his loss of commission or wages by an "action at law for his damages;* and this is so, though "it be conceded that he cannot procure other employ- "ment equally remunerative and respectable at Man- "hattan, or the same or other employment elsewhere. "His inability to get other employment might enhance "the damages, but it does not make his case one of "equitable cognizance. There is no averment in the "bill that the defendants are insolvent, and, in the ab- "sence of such an averment, their ability to respond to "the plaintiff for all damages which he may sustain on "account of their alleged wrongful acts will be pre- "sumed.

"*Section 723, Rev. St. U. S., declares that 'suits in "equity shall not be sustained in either of the courts "of the United States in any case where a plain, ade- "quate and complete remedy may be had at law.'* "This section is merely declaratory of the pre-existing "rule on the subject. The rule is elementary that, if the "wrong complained of can be adequately compensated "by a pecuniary sum, the remedy is at law, and an in- "junction will not issue. (*Kerr Inj. 226.*) This rule "is applicable to the case made by the bill, and fatal to "it.

"In the case of Wagner v. Drake, 31 Fed. Rep. 849, "—a case very similar to the one at bar—the learned "judge of the southern district of Iowa refused to "grant an injunction in favor of the proprietor of a "saloon to restrain the officers of the law, in Iowa, "from instituting and prosecuting proceedings under "the prohibitory law of that state, which it was al- "leged would destroy the plaintiff's business. Judge "Love said:

"'*The chief loss* of the saloon owner, if his business "is closed by the action of the state court, *is the value "of the fixtures and the furniture used in his trade. "These may be fully compensated in damages in ac- "tions at law.'*

"*Moreover the plaintiffs can appeal from the orders "and judgment of the District Court to the Supreme "Court of the state, and, if that court denies them any "right or privilege claimed under the Constitution or*

"laws of the United States, they may appeal to the "Supreme Court of the United States. These are all "the rights that parties to a suit in any court can de- "mand, and, in contemplation of law, they afford to "every suitor, in connection with the remedy the law "gives for illegal and unwarranted prosecutions, suf- "ficient legal redress. (High Inj., Secs. 28-30.)

"The bill seeks to enjoin criminal proceedings. A "court of equity possesses no such power. This prin- "ciple is settled by the uniform current of authorities "in England for two centuries, and in this country "from the foundation of its jurisprudence. The re- "cent emphatic reaffirmations of the doctrine by the "Supreme Court of the United States renders it un- "necessary to do more than repeat the rule in the lan- "guage of that court. The court said:

" 'The office and jurisdiction of a court of equity, "unless enlarged by express statute, are limited to the "protection of rights of property. It has no jurisdic- "tion over the prosecution, the punishment, or the par- "don of crimes or misdemeanors, or over the appoint- "ment and removal of public officers. To assume such "a jurisdiction, or to sustain a bill in equity to restrain "or relieve against proceedings for the punishment of "offenses, or for the removal of public officers, is to in- "vade the domain of the courts of common law, or of "the executive and administrative department of the "government. * * * * Mr. Justice Story, in his "Commentaries on Equity Jurisprudence, affirms the "same doctrine (Section 893). And in the American "courts, so far as we are informed, it has been strictly "and uniformly upheld, and has been applied alike, "whether the prosecutions or arrests sought to be re- "strained arose under statutes of the state or under mu- "nicipal ordinances. (*West v. Mayor, etc.*, 10 *Paige* "539; *Davis v. Society*, 75 *N. Y.* 362; *Tyler v. Ham- "mersley*, 44 *Conn.* 419, 422; *Stuart v. Supervisors*, 83 "*Ill.* 341; *Devron v. First Municipality*, 4 *La. Ann.* 11; "*Levy v. Shreveport*, 27 *La. Ann.* 620; *Moses v. "Mayor, etc.*, 52 *Ala.* 198; *Gault v. Wallis*, 53 *Ga.* 675; "*Phillips v. Mayor, etc.*, 61 *Ga.* 386; *Cohen v. Com- "missioners*, 77 *N. C.* 2; *Oil Co. v. Little Rock*, 39 *Ark.*

"412; *Spink v. Francis*, 19 *Fed. Rep.* 670, 20 *Fed. Rep.*
"567; *Suess v. Noble*, 31 *Fed. Rep.* 855; *in re Sawyer*,
"124 *U. S.* 210, 211, 8 *Sup. Ct. Rep.* 482; *High Inj.*
"*Sec.* 68.)'

"The cases at bar present in a forcible light the "inability of a court of equity to deal with criminal "prosecutions by injunction or otherwise, and the utter "confusion and failure of justice that would inevitably "result from the exercise of such jurisdiction. The "answers and affidavits filed in some of these cases "deny that the plaintiff's sales were limited to original "packages, and aver that they sold otherwise than in "original packages, and on the Lord's day and to mi-"nors, and that the business was conducted in such a "manner as to make it a nuisance. If the court should "assume jurisdiction of the cases, the chancellor, sitting "without a jury, would have to hear and determine all "these issues. And for what and with what result? If "the chancellor should find the plaintiffs had violated "the state law, as alleged by the defendants, he would "be powerless to punish them for the offense. If he "found the averments in the bill to be true, and granted "a perpetual injunction in the terms of the temporary "injunction in this case, the court could punish the de-"fendants, for a violation of the injunction, but it "would have no power to punish the plaintiffs for af-"terwards selling in violation of the state law. Sa-"loons are the source of a large percentage of the law-"lessness and crime in the land, and their proprietors "and managers are not particularly distinguished for "their strict observance of the laws regulating or re-"stricting the business. Suppose an original package "vendor, after securing a perpetual injunction, as "prayed in this case, sell liquor not in original pack-"ages, or otherwise violates the state law, what are "the officers of the state court, whose duty it is to "prosecute in such cases, to do? Must they apply to "this court for leave to prosecute before commencing "proceedings in the state court? Undoubtedly, if they "should proceed without the previous leave of the "court, the plaintiffs would charge them with a viola-"tion of the injunction, and ask the court to punish

"them for contempt; and the chancellor would again "be required to try the same issues of fact, with a view "to determine whether the state officers, including the "judges of the state courts, should be punished for "contempt, or whether such officers should graciously "have leave to prosecute the plaintiffs for a violation "of the criminal laws of the state. It is obvious that, "if this court once assumed this jurisdiction, it would "speedily draw to itself the supervision and control of "all the criminal prosecutions in the state growing out "of the traffic in liquor; for it is quite certain, if the "court once enters upon this business, that every ven- "dor of liquor in the state will claim to be a dealer "in original packages only, and whenever a prosecution "is commenced against him he will at once seek the "shelter and protection of an injunction from this "court. And the extraordinary spectacle would be pre- "sented of a United States court of chancery having its "whole time taken up in keeping watch and ward over "all the saloons in the state, protecting the proprietors "and their clerks from prosecutions, until it should "be first shown by the state to the satisfaction of the "chancellor that the state law has been violated, when "the chancellor would make an order granting the state "leave to prosecute for that violation."

Hemsley v. Myers, 45 Fed Rep 286.

It is our contention in this case, as was the contention of the defendants in the above case, that the allegation of appellant that he will sustain "irreparable damage and injury" is a *legal conclusion*, and that there are no facts alleged showing that appellant will sustain any damage that he cannot be fully compensated for in an action at law. In an action at law appellant may recover for labor done and material furnished in the erection of said gas works, and for whatever damage he may sustain under the contract.

Appellant in this case has a plain, speedy and ade-

quate remedy at law. And, moreover, as was said in the above decision, the appellant "can appeal from "the orders and judgments of the trial court to the "higher state court, *and if that court denies them any "right or privilege claimed under the Constitution or "laws of the United States,* he may appeal to the Su- "preme Court of the United States. *These are all the "rights that parties to a suit in any court can demand, "and in contemplation of law, they afford to every "suitor in connection with the remedy the law gives "for illegal and unwarranted prosecutions sufficient le- "gal redress.'*

One of the latest and best considered cases bearing upon the question as to whether a court of equity has power by injunction to restrain the execution of criminal statutes is the case of Fitts v. McGhee, reported in 172 U. S., page 516. In that case the plaintiff sought to restrain the enforcement of a penal statute of the state of Alabama. The bill alleged that the grand jury of Laudendale county, Alabama, had found a large number of indictments, some 100 or more in number, against the employees of the plaintiff. The bill further alleges that the said statute is invalid and void because in conflict with the Constitution of the United States, in that it deprived the plaintiffs of their property without due process of law, and denied them the equal protection of the laws The bill further alleged that said statute was invalid because unreasonable, and that the enforcement of said statute would cause the plaintiff great and *irreparable damage and injury, and would result in a multiplicity of actions.*

The Circuit Court, in said case, granted the injunction restraining the enforcement of said statute. From

the order granting the injunction an appeal was taken to the Supreme Court of the United States, and Mr. Justice Harlan, in rendering his decision reversing the Circuit Court, says, as follows:

* * * * * * * * *

"Under the view we take of the question, the citi-
"zen is not without effective remedy, when proceeded
"against under a legislative enactment void for repug-
"nancy to the supreme law of the land; *for, whatever*
"the form of proceeding against him, he can make his
"defense upon the ground that the statute is uncon-
"stitutional and void. And that question can ulti-
"mately be brought to this court for final determina-
"tion."

* * * * * * * * *

"It remains only to consider the case so far as the
"final decree assumes to enjoin the officers of the state
"from instituting or prosecuting any indictment or
"criminal proceedings having for their object the en-
"forcement of the statute of 1895. *We are of opinion*
"that the Circuit Court of the United States, sitting
"in equity, was without jurisdiction to enjoin the in-
"stitution or prosecution of these criminal proceedings
"commenced in the state court. This view is sustained
"In re Sawyer, 124 U. S. 200, 209, 210. * * * *

* * * * * * * * *

"At the present term of court, in Harkrader v. Wad-
"ley, 172 U. S. 148, 169, 170, we said: 'In proceed-
"ing by indictment to enforce a criminal statute the
"state can only act by officers or attorneys, and to en-
"join the latter, is to enjoin the state.' Again: *'Much*
"more are we of opinion that a Circuit Court of the
"United States, sitting in equity in the administration
"of civil remedies, has no jurisdiction to stay by in-
"junction, proceedings pending in a state court in the
"name of a state to enforce the criminal laws of the
"state. Undoubtedly, the courts of the United States
"have the power, under existing legislation, by writ
"of habeas corpus, to discharge from custody any per-
"son held by state authorities under criminal proceed-

"ings instituted under state enactments, if such enact-
"ments are void for repugnancy to the Constitution,
"laws or treaties of the United States. But even in
"such case we have held that this power will not be
"exercised, in the first instance, except in extraordinary
"cases, and the party will be left to make his defense
"in the state court. [Ex parte Royall, 117 U. S. 241.
"New York v. Eno, 155 U. S. 89. Witten v. Tomlin-
"son, 160 U. S. 231. Baker v. Grice, 169 U. S. 284].'

"But the existence of the power in the courts of the United States to discharge upon habeas corpus by "no means implies that they may, in the exercise of "their equity powers, interrupt or enjoin proceedings "of a criminal character in a state court. The plaint-"iffs state that the toll-gatherers in their service had "been indicted in a state court for violating the pro-"visions of the act of 1895 in respect of tolls. Let "them appear to the indictment and defend themselves "upon the ground that the state statute is repugnant "to the Constitution of the United States. The state "court is competent to determine the question thus "raised, and is under a duty to enforce the mandates "of the supreme law of the land. [*Robb v. Connolly,* "111 *U. S.* 624.]

"And if the question is determined adversely to the "defendants in the highest court of the state in which "the decision could be had, the judgment may be re-"examined by this court upon writ of error. That the "defendants may be frequently indicted constitutes no "reason why a Federal court of equity should assume "to interfere with the ordinary course of criminal pro-"cedure in a state court."

Fitts v. McGhee, 172 U. S. Rep. 528 et seq.

In the case of Minneapolis Brewing Co. v. McGillivray, 104 Fed. 258, a statement of the case as set out in the opinion of the court was as follows:

* * * * * * * * *

"That at all times mentioned in the bill the "plaintiff was, and now is, engaged in extensively man-"ufacturing and selling beer and other malt liquors,

"having its brewery or place of manufacture in the "city of Minneapolis. That for more than a year last "past plaintiff has owned and maintained, and still "owns and maintains, in the city of Madison, in the "county of Lake, in the state of South Dakota, a ware-"house or depository in which, during said times, it "has been storing, in original packages, a portion of "the product of its said brewery, under the circum-"stances and for the purposes hereinafter detailed.

* * * * * * * * * *

"That since the 1st day of July, 1900, the "defendant, in their official capacity aforesaid, and "claiming the right so to do under and pursuant to the "provisions of Chapter 72 of the Session Laws of "South Dakota for the year 1897, have demanded of "plaintiff that it pay for continuing to carry on its "said business at said city of Madison, and for the "continued operation and maintenance of its ware-"house at that place, the license fee of $600 specified "in Section 1 of said act upon the business of selling "only brewed or malt liquors at wholesale and that "plaintiff declined and refused to pay said fee upon the "ground that said statute so requiring its payment "was unconstitutional and void. That upon the re-"fusal of plaintiff to pay said license fee, and for the "alleged reason that it did not pay the same, the de-"fendants, claiming to act in their official capacity "as aforesaid, and claiming to be authorized by the "statute aforesaid, wrongfully and unlawfully threat-"ened to close said warehouse so operated and main-"tained by this plaintiff at said city of Madison afore-"said, and wrongfully and unlawfully threatened to "prosecute criminally this plaintiff and its said local "agent under Section 5 of said act, and to so prosecute "for each violation committed on each day if said "warehouse was continued to be operated as afore-"said by plaintiff, or if plaintiff continued to transact "the business theretofore transacted by it at said Mad-"sion. * * * * * * * * * *

"The plaintiff prays that said statute of the "state of South Dakota may be adjudged to be "unconstitutional and void, and that the defendants be

"permanently restrained and enjoined from attempt-"ing to enforce payment from plaintiff of said unlaw-"ful license fee of $600, and from in any wise inter-"fering with plaintiff's said warehouse at said city of "Madison, and its said business connected therewith."

The court said, in rendering its opinion:

"The only question that now presents itself is as to "the relief that this court has the power to grant the "complainant in this action. It is alleged in the bill "that the defendants, claiming to act in their official "capacity, threaten to close said warehouse so oper-"ated and maintained by this plaintiff at said city of "Madison aforesaid, and wrongfully and unlawfully "threaten to prosecute criminally this plaintiff and its "said local agent, under Section 5 of said act, and to "so prosecute for each violation committed on each "day, if said warehouse was continued to be operated "as aforesaid by plaintiff, or if plaintiff continued to "transact the business theretofore transacted by it at "said Madison. *In so far as this bill seeks to enjoin-"the commencement of criminal proceedings, it can-"not be maintained. A court of equity possesses no "such power. This is settled by a uniform current "of authorities in England for two centuries, and in "this country from the foundation of its jurispru-"dence."*

Minneapolis Brewing Co. v. McGillivray, 104 Fed. Rep. 259.

A BILL IN EQUITY WILL NOT LIE TO RESTRAIN PROSECUTIONS UNDER A MUNICIPAL ORDINANCE UPON THE MERE GROUND OF ITS ALLEGED INVALIDITY.

Upon this point we beg to cite the following decisions in which the question of the power of courts of equity to restrain criminal proceedings under alleged invalid statutes and ordinances was involved.

In the case of City of Denver v. Beede, 54 Pac. 624, the facts as stated by the court were as follows:

"Briefly, from the bill filed by appellee in the court "below, it appears that he is the proprietor of a theater "in the city of Denver, known as the "Orpheum," in "which he holds Sunday performances, without which, "it is alleged, he cannot successfully conduct his bus- "iness; that the city has passed an ordinance subject- "ing to a fine those conducting Sunday theatrical per- "formances similar to his. It is averred that this or- "dinance is invalid, and that the police authorities of "the city have arrested him for violation thereof, and "threaten in the event further Sunday performances "are given in his theater, to continue to arrest him "and his employees engaged therein, the result of "which, he alleges, will be to cause him irreparable in- "jury. On presentation of the bill a temporary in- "junction was issued, restraining appellants from ar- "resting or interfering with appellee or his employees "engaged in the conduct and management of his "theater on Sunday. Appellants interposed a general "demurrer to the bill, and motion to dissolve the writ, "both of which were overruled; and, having elected to "stand by their demurrer, the temporary injunction "was made permanent, from which judgments appel- "lants have appealed to this court.

"Gabbert, J., after stating the facts as above set "forth, rendered the following opinion:

" 'Two questions are urged by appellants in support "of their position that the judgment should be re-

"versed: First, insufficiency of the bill; second, *that* "the ordinance in question is invalid. The first ques- "tion to determine even though the ordinance may be "illegal, as charged, is *the sufficiency of the bill upon "which to predicate the judgment rendered, because, "if this should be resolved in favor of appellants, the "validity of the ordinance would not be involved,* and "it would be unnecessary, as well as improper, to pass "upon that question, as it would not be presented for "determination in this case. *The fundamental doc- "trine upon which the power of a court of equity rests "is that it proceeds only when there is no plain, ade- "quate and complete remedy in the law courts of which "the party invoking its aid can avail himself. This prin- "ciple is too elementary to require the citation of any "authority in its support,* and the real question is, has "the appellee, according to the averments of his bill, "a legal remedy which is adequate and sufficient for "the protection of his rights?

"A court of equity will not restrain a prosecution "at law when the question is the same at law as in "equity. Wallack v. Society, 67 N. Y. 23. An ex- "ception to this rule exists where an injunction is nec- "essary to protect a party from oppressive and vexa- "tious litigation, *but in such cases the court only acts "by granting an injunction after the controverted "rights has been determined in a previous action in "favor of the party applying for such relief. Id.* Ap- "pellee admits that he has violated this ordinance, and "inferentially avers his intention of doing so in the "future, but rests his right to the judgment rendered "upon the ground that the ordinance is invalid, and, "if the executive officers of the city are not restrained "from prosecuting him and his employees for such "violation, he will suffer irreparable injury. If the "ordinance is valid, then he cannot complain if he is "successfully prosecuted for its violation, no matter "what the result may be to his business. *If invalid, "that is a defense which he can interpose in the court "where originally prosecuted for such violation, or "in which such cases may be tried on appeal or error. "The legality or illegality of the ordinance is purely*

"a question of law, which it is competent for a court "at law to decide. We cannot assume that the courts "in which the validity of the ordinance is presented "will not decide this question correctly, nor are we ad- "vised what was the result of the trial of the cause in "which he was arrested, as alleged in his bill, or that "he has availed himself in that action of the defense "based upon the illegality of the ordinance. *The legal "presumption is that every court will decide questions "presented for its determination properly, and con- "duct proceedings before them fairly and impartially.* "(Wolfe v. Burke, 56 N. Y. 115); *so that it is at once "apparent that the main question upon which appellee "relies, namely, the invalidity of the ordinance, can "be presented and determined in any action which may "be instituted against him for the violation of his or- "dinance; and as the law is well settled by numerous "well considered cases that, as a general rule, a bill "in equity will not lie to restrain prosecutions under "a municipal ordinance upon the mere ground of its "alleged illegality, for the obvious reason that the "party prosecuted thereunder has a complete remedy "at law, because he can avail himself of such illegal- "ity as a legal defense in prosecutions thereunder.* "(*Poyer v. Village of Dos Plaines*, 20 *Ill. App.* 30; *"Levy v. City of Shreveport*, 27 *La.* 620; *Dill. Mun. "Corp., Secs.* 906, 908, *note; High. Inj., Sec.* 1244). *"it follows that the averment in the bill of appellee that "the ordinance of which he complains is invalid is not, "of itself, sufficient to entitle him to the relief granted "by the lower court.*

"It is urged by appellee that two other questions are "involved, which, in connection with the alleged in- "validity of the ordinance,—namely, irreparable in- "jury, and to prevent a multiplicity of suits,—are suf- "ficient to permit the judgment to stand. What is "meant by the expression "irreparable injury" is "clearly and concisely stated by our court of appeals "in the recent case of Watson v. Major, 50 Pac. 741, "where Judge Wilson, in speaking for the court, says: " 'In order to constitute irreparable injury within the "meaning of the law, the threatening of which would

"justify a court of equity in exercising its extraordi-
"nary power of injunction, *it must clearly appear, not*
"only that the wronged party could not be compen-
"sated in damages therefor, but also that the injury
"would follow if the court did not so interpose.'

"As before suggested, if this ordinance is invalid,
"we cannot assume that the court in which appellee
"may be tried for its violation will not so hold, if this
"question is presented; *nor can we presume that, if he*
"is acquitted upon this ground, the officers of the city
"will continue to harrass him with further arrests. So
"that, if his own contention be true, he is in no dan-
"ger of suffering the irreparable injury of which he
"complains; nor would he, under such circumstances,
"be subjected to a multiplicity of suits. It would
"doubtless be convenient for appellee to have the judg-
"ment of the court upon the validity of the ordinance
"before subjecting himself to liability for accumulated
"penalties; but, if arrested and convicted, and he
"chooses to take the chances of ultimately defeating
"the ordinance upon the ground of its invalidity, *that*
"is no ground for equitable interference. Wallack v.
"Society, supra. There are cases in which a munic-
"ipality will be restrained in equity from the enforce-
"ment of its ordinances, but an examination of the
"carefully considered cases on this subject leads us
"to the conclusion that the weight of authority is that
"the interposition of a court of equity can only
"be invoked in such cases clearly within the well-rec-
"ognized equitable rule above announced; and assum-
"ing, but not deciding, that, according to the aver-
"ments of the bill, the ordinance in question is illegal,
"the other elements necessary to entitle appellee to an
"injunction in this case are absent, and the demurrer
"to the bill should have been sustained.

City of Denver v. Beede, 54 Pac. Rep. 624.

And so we contend in this case, that if the city Ordinance No. 7029, under which appellant is being prosecuted, is invalid, that *"this invalidity constitutes a defense which it can interpose in the court where*

originally prosecuted, or in which such cases may be tried on appeal or error." And that *"the legality or illegality of the ordinance is purely a question of law, which it is competent for a court of law to decide."* And we earnestly insist that all the principles of law with reference to the power of a court of equity to restrain the enforcement of criminal laws, enunciated in the foregoing case, have full application to the facts in the case at bar.

"Nor can there be any for the proposition that the "court should declare void an unenforced municipal "ordinance. To do so would be to pass upon a mere "abstraction. *If the plaintiffs or any one else, should "violate the ordinance upon a criminal prosecution "for such violation, the validity of the ordinance, and "of the acts of the legislature authorizing and vali- "dating it, would come directly and properly before "the courts; or if the town, by arrest or otherwise, "should prevent the attempted violation, an action for "damages, as in the case cited, or an indictment, would "equally present the question."*

Wardens of St. Peter's Episcopal Church v. Town of Washington, 13 S. E Rep. 700.

"*Injunctions to prevent criminal prosecutions have "been held so completely beyond the jurisdiction of "courts of chancery that their decrees in such cases "have been disregarded as absolutely void in collateral "proceedings, and parties arrested for contempt for "violating their injunctions discharged on habeas cor-* "*pus. Ex parte* Sawyer, 124 U. S. 200, 8 Sup. Ct. "482, 31 L. Ed. 402. In this case the mere fact that "the injunction is not asked against the prosecuting "attorney of the state *eo nomine* can make little or no "difference. This court must look to the effects of "said restraining order and prayer for injunction, and "determine whether or not it enjoins or will enjoin,

"if granted, the institution of criminal proceedings to "enforce the act.

"Having examined the various allegations of the "bill for injunction, in our opinion it did not state a "cause which fell within the class of which the circuit "court had jurisdiction to grant an injunction, for "the reason that the alleged unconstitutionality of the "law alone furnishes no ground for injunction; and "because the circuit court had no jurisdiction to pre- "vent the institution of criminal proceedings by the "inspector by information to punish violations of said "act, and because, *in our opinion, the bill otherwise "charges no traversable facts showing a want of an "adequate remedy at law, but, on the contrary, shows "that the courts of law are open to the plaintiff in said "case to make their defense to any prosecution under "said act.*"

State v. Wood, 56 S. W. Rep. 477.

"A court of equity cannot grant an injunction "against the prosecution of criminal proceedings even "in cases of a criminal prosecution for trespass in "which a disputed property right is involved as to "which equity has jurisdiction to afford relief."

Crighto v. Dahmer (Miss.), 21 L. R. A. 84 and note.

"One court cannot entertain jurisdiction of an action "upon the ground that another court of competent "jurisdiction or another branch of the same court will "decide wrong or improperly. The legal presump- "tion is that every court will decide right and conduct "the proceedings before them fairly, impartially and "correctly. *By a threatened prosecution the plaintiffs "will not be injured in any such sense as entitles them "to invoke the equitable powers of the court.*"

Wolfe v. Burke, et al., 56 N. Y. 115.

"Assuming the unconstitutionality of the act of "1872, the plaintiff is not upon the facts stated in the "complaint entitled to an injunction. The general "rule is that the court will not restrain a prosecution

"at law when the question is the same at law and in "equity. An exception exists where an injunction is "necessary to protect a defendant from oppressive and "vexatious litigation. But the court acts in such cases "by granting an injunction only after the controverted "right has been determined in favor of the defendant "in a previous action. On this ground the Chancel- "lor in West v. the Mayor (10 Paige 539) dissolved "a temporary injunction restraining the defendant "from prosecuting suits against the complainant for "violation of a corporation ordinance claimed to be "invalid. *The unconstitutionality of the act of* 1872 *"would be a perfect defense to a prosecution for the "penalties given by it*, and the question as to the con- "stitutionality of the act has not been determined. It "would doubtless be convenient for the plaintiff to "have judgment of the court upon the constitutional- "ity of the act before subjecting himself to liability for "accumulated penalties. But this is not a ground for "equitable interference, *and to make it a ground of "jurisdiction in such cases would in the general result "encourage rather than restrain litigation."*

Wallack v. Society, etc., 67 N. Y. 28.

"The question as to the validity of the corporation "ordinances does not properly belong to this court for "decision, where the complainants, as in this case, have "a perfect defense at law if the ordinances are in- "valid. * * * And it would be an usurpation of "jurisdiction by this court if it should draw to itself "the settlement of such questions when their decis- "ion was not necessary to the discharge of the legiti- "mate duties of the court.

"In the case of Oakley v. the Mayor of N. Y., etc., "which was a bill for an injunction to restrain the "prosecution of suits at law under the market ordi- "nances it was decided that if the objection to the le- "gality of those ordinances were well taken the com- "plainant had a perfect defense at law. And that "this court would not grant an injunction to protect "him against a multiplicity of suits until his right

"to such protection had been established by a success-
"ful defense at law in some of the suits."

"In the present case the complainant's bill does not
"show that they have established their right at law,
"but on the contrary it is distinctly stated in the bill
"that in some of the suits which have been commenced
"the decision has been adverse to the complainants,
"and that the other suits have not yet been decided.
"It is true that they complain that in those cases the
"court decided the law against them and did not sub-
"mit the legality of the ordinance to the jury to be de-
"cided as matter of fact, and that they intended to
"carry the question as to such legality before a higher
"tribunal for decision. But neither of those circum-
"stances can give jurisdiction to this court to inter-
"fere before the right of the complainants is estab-
"lished by such higher tribunal. And if they are suc-
"cessful there it is not probable that the interference
"of this court will be necessary."

West v. Mayor of N. Y., 10 Paige 539.

"Accordingly as the ordinance involved in the pres-
"ent case (laundry ordinance) is with reference to
"means provided for its enforcement purely penal in
"its nature, the court below had no power upon an ap-
"plication for injunction against its enforcement to
"inquire into its validity either upon constitutional or
"other grounds and to enjoin the city from attempt-
"ing to enforce it. *If the ordinance is invalid by rea-*
"son of its unconstitutionality, or for other cause, such
"invalidity would be a complete defense to any pros-
"ecution that might be instituted for its violation."

City of Bainbridge v. Reynolds, (Ga.) 36 S. E. 934; 111 Ga. 758.

"A court of equity will not interfere by injunction
"to restrain the execution of a municipal ordinance of
"a criminal nature on the ground of the invalidity of
"such ordinance, *nor on the further ground that the*
"plaintiff is exempt from the operation of the same.
"The person affected has a full and adequate remedy

"at law to test the validity of the ordinance as well as "the question of his exemption from its operation."

Mayor v. Patterson, Ga. (1900) 34 S. E. 600

THE CASES RELIED UPON BY APPELLANT ARE NOT IN POINT OR HAVE BEEN OVERRULED.

Appellant has cited many cases which they say support their contention that "A court of equity has "power to restrain by injunction a municipality from "instituting criminal proceedings when such proceed-"ings are threatened under color of an invalid ordi-"nance for the purpose of compelling the relinquish-"ment of a property right;" but the court will find from an inspection of those cases that the property rights involved were not analogous to or parallel with the alleged property right of appellant herein, but of an entirely different nature and character. All of said cases so cited by appellant are clearly distinguishable from the one at bar. For instance, the case of Central Trust Company v. Citizens' St. R. Co., reported in 80 Fed. Rep. 225, and again in 82 Fed. Rep. 1, is a case where the City of Indianapolis attempted to enforce an ordinance changing the rate of street car fare to be charged by plaintiff from five to three cents for each passenger, and the company alleged that it would work them great and irreparable damage and injury, and entirely destroy their business. It requires no great stretch of the imagination to perceive how, for the plaintiff to have been compelled to cease conducting its street car business until a court of law could

in the regular order of business determine the merits of the case, would subject the plaintiff to great injury and damage and work a complete destruction of its business. How entirely different is the property right of appellant here. Moreover, as an authority this case of Central Trust Co. v. Citizens' St. R. Co., relied so implicitly upon by appellant, is not in point, and is contrary to and overruled by Fitts v. McGee, 172 U. S., hereinbefore cited.

We will now put a case parallel with the one at bar.

Suppose appellant were charged with the erection of a slaughter house, a powder magazine or pest house, under exactly similar conditions and circumstances and contractual relations that appellant is building this gas works, and the City of Los Angeles were seeking to enforce a penal ordinance against the erection of the same, similar to the ordinance under consideration, and adopted under similar circumstances, would a court of equity grant appellant an injunction restraining the city from enforcing the ordinance, and permit it to build and maintain said slaughter house. powder magazine or pest house until a court of law could pass upon the validity of the ordinance? We have an abiding conviction that a court of equity would do no such thing. It would be far better and more in consonance with the principles of equity and good government to permit the city to compel appellant to cease work on such buildings until the validity of the ordinance could be determined, rather than to compel the city to remain passive while such dangerous

institutions were being erected in its midst to the peril of its citizens.

So we say, in this case, it is better and more in consonance with the principles of equity, good conscience and good government, that appellant be compelled by the city to cease said work until the validity of the ordinance can be determined by a court of law than that the city's hands be tied by injunction and the municipality be compelled to remain idle while this menace to the safety, comfort and lives of her citizens is being erected in her midst.

We believe that equity will not be swift to imperil the lives, the property, the safety and the comfort of the people by staying municipalities from enforcing criminal ordinances such as the one under consideration.

The case of Lottery Co. v. Fitzpatrick, 3 Woods 222 Fed. Cases, No. 8541, which is another case that appellant herein relies most strongly upon and has cited in his argument oftener possibly than any other one, is in direct conflict with the decision of this Honorable Court in the case of Stone v. Mississippi, 101 U. S. 814, and as an authority is not only overruled by decision in Stone v. Mississippi, but also by Fitts v. McGee, 172 U. S. 516, and *Ex parte* Sawyer, 124 U. S. 200.

With reference to the case of City of Austin v. Austin City Cemetery Association, we have only to say that this case is in conflict with the practice and procedure of the State of California, and is in conflict with and disregards the general rule and uniform de-

cisions of the highest courts of the United States and of the several states. It certainly disregards the case of Wardens v. Washington, 109 N. C. 21; 13 S. E. 700, hereinbefore cited, a case where the only question considered by the court was the one of jurisdiction.

It is based on the decision in City of Atlanta v. Gas Light Co., 71 Ga. 106, which is distinguished in Paulck v. Sycamore, 104 Ga. 24, and City of Bainbridge v. Reynolds, 111 Ga. 758, where the true rule is stated. With due respect to the court that rendered the decision in said case of City of Austin v. Austin City Cemetery Assn., we submit that it is not in consonance with the general rule and not entitled to consideration as an authority.

The case of Reagan v. Trust Co., 154 U. S., where the Railroad Commissioners of the State of Texas attempted to fix rates, another case relied upon by appellant, is similar to the case of Central Trust Company v. Citizens' St. R. Co. *supra,* and is not analogous to the case at bar.

The M. Schandlar Bottling Co. v. Welch *et al.,* 42 Fed. Rep. 561 most strongly relied upon by appellant, was overruled by the decision in Hemsley *et al.* v. Myers *et al.,* reported in 45 Fed. 283 and hereinbefore quoted.

The case of Detroit v. Detroit Citizens' Street Railway Company, cited by appellant, is not a case in point with the one at bar. There was no *penal* ordinance or statute sought to be enforced against the party seeking the injunction; in fact, the injunction

was not asked to restrain the institution of any criminal proceedings, as was done in this case.

The court will further observe that Mr. Justice Peckham, who rendered the opinion in that case, iterates and reiterates "that no objection was taken to the jurisdiction of the court at any stage of the litigation;" nor was there any objection taken or insisted upon that there was a plain and adequate remedy at law. *Objections on both these grounds have been taken, and urged at all stages of the proceedings in this case, and therefore that decision has no bearing upon this controversy.*

With the exception of the case last mentioned, all the decisions relied upon by appellant in its brief were submitted to the Circuit Court and were fully considered by Judge Wellborn in his opinion rendered therein, which we quote in full, for the reason that it convincingly shows that there is no equity in the bill and that the authorities relied on by appellant on the question of jurisdiction are not in point.

"Complainant at the commencement of this suit "was erecting within the city of Los Angeles, for "and under contract with another party, a water "holder and gas tank, and filed its bill solely to en- "join threatened criminal prosecutions, under an "ordinance of said city alleged to be invalid, against "its employees for working on said structures, the "purpose and effect of which prosecutions, the bill al- "leges are to compel complainant to abandon said work, "and thereby destroy or impair its vested property "rights. The questions now presented for considera- "tion relate to the equitable jurisdiction of this court, "and the validity of said ordinance. These questions "will be taken up in the order of their statement, be-

"cause, if the jurisdiction does not exist, further in-
"quiry concerning the ordinance is unnecessary.

"The Supreme Court of the United States has said:

"The office and jurisdiction of a court of equity,
"unless enlarged by express statute, are limited to the
"protection of rights of property. It has no jurisdic-
"tion over the prosecution, the punishment or the par-
"don of crimes and misdemeanors, or over the ap-
"pointment or removal of public officers. To assume
"such a jurisdiction, or to sustain a bill in equity to
"restrain or relieve against proceedings for the pun-
"ishment of offenses or for the removal of public of-
"ficers, is to invade the domain of the courts of com-
"mon law, or of the executive and administrative de-
"partment of the government. * * *

"The modern decisions in England by eminent
"equity judges concur in holding that a court of chan-
"cery has no power to restrain criminal proceedings,
"unless they are instituted by a party to a suit already
"pending before it, and to try the same right that is
"in issue there. (*Attorney General v. Cleaver,* 18 *Ves.*
"211, 220; *Turner v. Turner,* 15 *Jur.* 218; *Saull v.*
"*Brown, L. R.* 10 *Ch.* 64; *Kerr v. Preston Corp,* 6
"*Ch. Div.* 463.)

"Mr. Justice Story, in his Commentaries on Equity
"Jurisprudence, affirms the same doctrine. Story Eq.
"Jur., Sec. 893. And in the American courts, so far
"as we are informed, it has been strictly and uni-
"formly upheld and has been applied alike whether
"the prosecutions or arrests sought to be restrained
"arose under statutes of the state or under municipal
"ordinances. (*West v. Mayor, etc.,* 10 *Paige,* 539;
"*Davis v. Society,* 75 *N. Y.* 362; *Tyler v. Hamersley,*
"44 *Conn.* 419, 422, 26 *Am. Rep.* 471; *Stuart v.*
"*Board,* 83 *Ill.* 341, 25 *Am. Rep.* 397; *Devron v.*
"*First Municipality,* 4 *La. Ann.* 11; *Levy v. City of*
"*Shreveport,* 27 *La. Ann.* 620; *Moses v. Mayor, etc.,*
"52 *Ala.* 198; *Gault v. Wallis,* 53 *Ga.* 675; *Phillips v.*
"*City of Stone Mountain,* 61 *Ga.* 386; *Cohen v. Golds-*
"*boro Comr's,* 77 *N. C.* 2; *Waters-Pierce Oil Co. v.*
"*City of Little Rock,* 39 *Ark.* 412; *Spink v. Francis,*
"19 *Fed.* 670; *Ind. (C. C.)* 20 *Fed.* 567; *Suess v.*

"*Noble* (*C. C.*) 31 *Fed.* 855; *Ex Parte Sawyer*, 8 *Sup.* "*Ct.* 482, 124 *U. S.* 200, 31 *L. Ed.* 402.)

"To the same effect are the following cases:

"(*Suess v. Noble*, (*C. C.*) 31 *Fed.* 855; *Hemsley v.* "*Myers and other cases, including M. Schandler* "*Bottling Co. v. Welch* (*C. C.*) 45 *Fed.* 283; *Brewing* "*Co. v. McGillivray*, (*C. C.*) 104 *Fed.* 272; *Crighto* "*v. Dahmer*, (*Miss.*) 13 *South* 237, 21 *L. R. A.* 84, "35 *Am. St. Rep.* 666; *City of Denver v. Beede*, (*Colo.* "*Sup.*) 54 *Pac.* 624; *Wardens of St. Peter's Episcopal* "*Church v. Town of Washington* (*N. C.*) 13 *S. E.* "700; *City of Moultrie v. Patterson* (*Ga.*) 34 *S. E.* "600.)

"The clear and positive declaration of law by the "highest judicial tribunal of the land in *Ex parte* "Sawyer, *supra*, is, without the other citations, de- "terminative of the case at bar, since the prosecu- "tions here sought to be enjoined are outside the ex- "ception to and fully within the general rule enun- "ciated in the Sawyer case.

"Complainant, however, contends that said rule is "further restricted to the extent indicated by the fol- "lowing excerpts:

" 'Writers on equity jurisdiction properly say that "the court of chancery does not deal with matters of "crime, misdemeanors, offenses against prohibitory "laws, nor questions of mere morality. But there is "this reservation: that it is only when those matters "are not connected with rights of property with re- "spect to which the court has jurisdiction. Circum- "stances may confer a jurisdiction. Attorney Gen- "eral v. Cleaver, 18 Ves. 211; Macaulay v. Shackell, "1 Bligh (N. R.) 96. In Spinning Co. v. Riley, L. "R. 6 Eq. 558, the vice-chancellor says: 'The juris- "diction of this court is to protect property and it will "interfere by injunction to stay any proceedings, "whether connected with crime or not, which go to "the immediate or tend to the ultimate destruction of "property, or to make it less valuable for use or oc- "cupation.' Lottery Co. v. Fitzpatrick, 15 Fed. Cas. "984. (No. 8, 541).

"Counsel urged that this bill does not show a cause

"of action cognizable in chancery against Mr. Wilt-
"sie, the district attorney, since its purpose is to re-
"strain him from instituting prosecutions under color
"of the amendment of 1897. But this complainant is
"seeking to protect a property right, and it seems to
"be law that when such prosecutions are threatened,
"under color of an invalid statute, for the purpose of
"compelling the relinquishment of a property right,
"the remedy in chancery is available. Central Trust
"Co. v. Citizens' St. R. Co., (C C.) 80 Fed. 225.
"'If the charge be of a criminal nature, or offense
"against the public, and does not touch the enjoyment
"of property, then a court of equity should not inter-
"pose by injunction.' On the other hand, where it
"is manifest, as in this case, that a prosecution and ar-
"rest is threatened for an alleged violation of city or-
"dinances for the sole purpose of preventing the ex-
"ercise of civil rights conferred directly by law, in-
"junction is a proper remedy to prevent injury to the
"party thus menaced. City of Atlanta v. Gate
"City Gaslight Co., 71 Ga. 126. Besides the
"three cases last named, complainant also cites
"in support of its contention the following:
"(*Regan v. Trust Co.*, 154 *U. S.* 388, 14 *Sup. Ct.*
"1047, 38 *L. Ed.* 1014; *Los Angeles City Water Co.*
"*v. City of Los Angeles*, (*C. C.*) 103 *Fed.* 711; *M.*
"*Schandler Bottling Co. v. Welch*, (*C. C.*) 42 *Fed.*
"561; *City of Rushville v. Rushville Natural Gas Co.*,
"(*Ind. Sup.*) 28 *N. E.* 853, 15 *L. R. A.* 321; *Spinning*
"*Co. v. Riley*, *L. R.* 6 *Eq.*, 558; *City of Austin v. Aus-*
"*tin City Cemetery Ass'n.* (*Tex. Sup.*) 28 *S. W.* 528;
"*Mayor, etc., v. Radecke*, 49 *Md.* 217, 33 *Am. Rep.*
"239; *Port of Mobile v. Louisville & N. R. Co.*,
"(*Ala.*) 4 *South* 106, 15 *Am. St. Rep.* 342; *Wood v.*
"*City of Brooklyn*, 14 *Barb.* 425; *Iron Works v.*
"*French*, 12 *Abb. N. C.* 466.)

"While it is not my purpose to examine in detail all
"of complainant's citations, brief reference will be
"made to a few of them.

"The opinion of the Lottery case, *supra*, as shown
"by the above quotation therefrom, rests largely upon a
"principle of equity, well recognized, but which, it
"seems to me, was inapplicable. The same is true of

"City of Atlanta v. Gate City Gaslight Co., *supra*, "where the opinion quotes from Kerr on Injunctions "the principle to which I refer, as follows:

" 'A court of equity, said Kerr (Injunctions, 2), has "no jurisdiction in matters merely criminal or merely "immoral, which do not affect any right of property. "If a charge be of a criminal nature, or of an offense "against the public peace, and does not touch the en- "joyment of property, jurisdiction cannot be enter- "tained. * * * * * But if an act which is also "criminal touches also the enjoyment of property, the "court has jurisdiction, but its interference is founded "solely on the ground of injury to property. (71 "*Ga.* 126.)'

"In City of Austin v. Austin City Cemetery Ass'n. "(Tex. Sup.) 28 S. W. 529, the court discerns and "states the inapplicability of the principle as follows:

" 'Yet it has been held that the court will interfere "to prevent acts amounting to crime, if they do not "stop at crime, but also go to the destruction or de- "terioration of the value of property. (*Spinning Co. "v. Riley*, 6 *Eq.* 551.) This, however, does not as- "sist us materially in the solution of the present ques- "tion. It would seem clear that if a party could be "enjoined from doing an act, not criminal in its na- "ture, which is injurious to the property of another, "he could also be enjoined if the act be one made pun- "ishable by law as a crime. The punishment of the "criminal, when the act committed has injuriously af- "fected the value of the property of another, does not "repair the injury. The question under consideration "arises upon quite a different case.'

"The principle of equity above stated, whose mis- "application has led to erroneous conclusions, as I con- "ceive, in some of the cases cited by complainant, "means simply that the fact that a threatened act, if "done, would be a crime, will not prevent a court of "equity from enjoining the commission of the act, "where it would also be an invasion of complainant's "property rights, and the other requisites to equitable "relief concur.

"The case most frequently cited for this principle is

"Spinning Co. v. Riley, L. R. 6. Eq. 551, where, at "page 558, the court, without reference to its facts, "says:

" 'The jurisdiction of this court is to protect prop- "erty, and it will interfere by injunction to stay any "proceedings, whether connected with crime or not, "which go to the immediate, or tend to the ultimate, "destruction of property, or make it less valuable for "use or occupation.'

"This quotation, although so often otherwise as- "sumed, has no reference whatever to criminal prose- "cutions, or even to civil suits; but the word 'pro- "ceedings' therein employed, has an entirely different "application, as clearly appears from the facts stated "in the syllabus of the case, which is as follows:

" 'The defendants, who were officers of a trades "union, gave notice to workmen, by means of pla- "cards and advertisements, that they were not to hire "themselves to the plaintiff pending a dispute between "the union and the plaintiffs. The bill prayed an in- "junction to restrain the issuing of the placards and "advertisements, alleging that by means thereof the "defendants had in fact intimidated and prevented "workmen from hiring themselves to the plaintiffs, and "that the plaintiffs were thereby prevented from con- "tinuing their business, and that the value of their "property was seriously injured and materially dimin- "ished. Held, upon demurrer, that the acts of the de- "fendants, as alleged by the bill, amounted to crime, "and that the court would interfere by injunction to "restrain such acts, inasmuch as they also tended to "the destruction or deterioration of property.' L. R. "6 Eq. 551.

"As a further abstract statement of the law con- "cretely enunciated in said syllabus, substantially, "however, to the same effect as the one above quoted, "the court, at page 560, says:

" 'The truth, I apprehend, is that the court will in- "terfere to prevent acts amounting to a crime, if they "do not stop at crime, but also go to the destruction or "deterioration of the value of property.'

"This rule has no connection with, or relation

"whatever to, the question of the power of a court of "equity to enjoin criminal prosecutions, and I am un- "able to accept as well reasoned any conclusion which "results from confounding the two matters.

"In Reagan v. Trust Co. neither the opinion of "court nor briefs of counsel discuss or in any way "refer to the question last mentioned, and this, doubt- "less, for the reason that the proceedings there en- "joined were not criminal prosecutions, but civil ac- "tions to recover statutory forfeitures and penalties, "and moreover in that case there were other grounds "for equitable relief.

"In Los Angeles City Water Co. v. City of Los "Angeles, of the numerous authorities which the opin- "ion cites concerning the remedy by injunction, not "one touches the question of equitable cognizance over "criminal prosecutions; and the inference is a fair one "that it was not presented in argument, or specially "considered by the court. Furthermore, there was "jurisdiction in the case to enjoin civil suits for the "forfeiture of complainant's property; and it was, no "doubt, assumed, by all the parties (whether correctly "or otherwise need not now be considered) that the "courts having acquired jurisdiction for one would "exercise it for all purposes.

"In M. Schandler Bottling Co. v. Welch, (C. C.) "42 Fed. 561, on which complainant seems to place "much reliance, the opinion of Phillips, district judge, "was filed July 18, 1890, on the granting of a tempo- "rary injunction. Afterwards, to-wit, February 18, "1891, the same case was heard on demurrer before "Caldwell, circuit judge, when the demurrer was sus- "tained, the temporary injunction was dissolved, and "the bill dismissed for want of equity. (45 Fed. 283.) "On the first hearing the court said:

" 'The remaining question not disposed of in that "discussion is whether or not this suit is obnoxious to "the objection that a court of equity never extends its "jurisdiction to the enjoining of criminal proceedings. "This is unquestionably a well-settled rule of equity "jurisprudence. (Kansas City Cable Co. v. City of "Kansas City, 29 Mo. App. 89, and loc. cit.) This

"question underwent extensive discussion in *Ex parte* "Sawyer, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. "402. Mr. Justice Gray, who delivered the majority "opinion, said, *inter alia:* "The office and jurisdic- "tion of a court of equity, unless enlarged by express "statute, are limited to the protection of rights of "property. It has no jurisdiction over the prosecution, "the punishment, or the pardon of crimes or misde- "meanors. * * * * * To assume such a juris- "diction or to sustain a bill in equity to restrain or "relieve against proceedings for the punishment of "offenses, * * * * is to invade the domain of "the courts of common law." Without stopping to "consider whether this general rule is limited to crim- "inal proceedings already begun in the court of crim- "inal jurisdiction, it is sufficient to the matter in hand "to say, as indicated in the quotation above made, that "the rule has its exceptions. One of these is where "a threatened criminal proceeding is hostile, vexatious, "and unwarranted, and involves the wanton destruc- "tion of, or injury to, property interests of the ac- "cused, and especially so under circumstances where, "if permitted to proceed, the party injured would have "no adequate remedy at law for restitution. Mr. Jus- "tice Gray recognizes this. He quotes from Sheridan "v. Colvin, 78 Ill. 327: 'It is elementary law that the "subject matter of the jurisdiction of a court of chan- "cery is civil property. The court is conversant only "with questions of property and the maintenance of "civil rights. Injury to property, whether actual or "prospective, is the foundation on which the jurisdic- "tion rests. The court has no jurisdiction in matters "purely criminal or merely immoral, which do not af- "fect any right to property.' Again he says: 'No "question of property is suggested in the allegations "of matters of fact in the bill, or would be involved in "any decree that the court could make thereon.' 42 "Fed. 563.

"On the latter hearing the court said:

" 'The bill seeks to enjoin criminal proceedings. A "court of equity possesses no such power. This prin- "ciple is settled by the uniform current of authorities

"in England for two centuries, and in this country "from the foundation of its jurisprudence. The re- "cent emphatic reaffirmance of the doctrine by the Su- "preme Court of the United States renders it unneces- "sary to do more than repeat the rule in the language "of the court.'

"Then follows the quotation which I have already "given from *Ex parte* Sawyer, *supra*.

"Thus it will be seen that the latter decision, al- "though not so in terms, is substantially a reversal of "the former one. It will also be noted that the opinion "on the first hearing, when the temporary injunction "was granted, seeks to draw support from *Ex parte* "Sawyer, by quoting certain expressions of Mr. Jus- "tice Gray with reference to property rights and civil "rights. Obviously, however, these expressions were "used by Mr. Justice Gray not to suggest a further ex- "ception, but merely to show that the facts of the case "did not bring it within the exception embodied in his "previous statement of the general doctrine, which I "have already quoted, namely (the italics being mine):

" 'The modern decisions in England by eminent "equity judges concur in holding that a court of chan- "cery has no power to restrain criminal proceedings, *"unless they are instituted by a party to a suit already "pending before it, and to try the same right that is in "issue there.'*

"This unambiguous and definite statement of the "rule does not admit of any exception other than the "one which it expressly allows. Besides, a careful exam- "ination of at least one of the authorities cited (Suess "v. Noble (C. C.) 31 Fed. 855) shows that no other "exception could have been in the mind of the court. "The following is the statement of the case:

" 'The original cause of State v. Suess was removed "from the district court of Jefferson county, Iowa, to "this court upon the petition of said Suess, and the "same is now pending here. The transfer was made "in pursuance of the decision of the circuit judge "(Brewer) in the case of State v. Walruff (C. C.) 26 "Fed. 178. The purpose of that proceeding was to "have the brewery owned and maintained by said

"Suess declared a nuisance, and, as such, perpetually "enjoined and abated. A temporary restraining or- "der, which is still in full force, was issued from this "court, the purpose of which was to restrain certain "persons, who were carrying on the civil proceedings "in the state court, from prosecuting the same to the "injury and virtual destruction of the property pend- "ing the determination of the question of the jurisdic- "tion of this court over the subject-matter of the said "original suit. Lewis Suess now presents his petition "to this court against the above-named defendants "and others, alleging that they are engaged in com- "mencing and carrying on many criminal prosecutions "against him before certain justices of the peace "for "each separate sale of beer at his brewery," and that "they propose "to place him on trial and find him "guilty of selling intoxicating liquors, and to impose "upon him heavy fines for said alleged offenses," etc. "He also states in a supplemental petition, that he was "indicted at the January term of the district court of "said county for the alleged crime of causing a nui- "sance by the sale of beer at his brewery, that he was "convicted of said alleged offense, and that he has "taken an appeal to the Supreme Court of Iowa upon "the federal question as to the constitutionality of the "prohibitory law, etc. The prayer of his petition is "that this court issue an injunction restraining said "defendants from the prosecution of said criminal "suits in violation of his rights respecting the subject- "matter of the action now pending in this court until "the final determination of the same.'

"Thus it will be seen that the criminal prosecutions "sought to be enjoined were one of the means em- "ployed to close up the complainant's business, and "yet the court held (quoting the syllabus):

" 'No power exists in any court of equity to inter- "fere by injunction with the prosecution and punish- "ment of crimes and offenses in the courts of the com- "mon law.'

"In the quotation which Mr. Justice Gray makes "from the Illinois case of Sheridan v. Colvin, the "phrase, 'The court has no jurisdiction in matters

"purely criminal or merely immoral which do not af-
"fect any right to property,' has no reference to crim-
"inal prosecutions, but was simply intended to declare
"that a court of equity would not interfere with acts
"merely on the ground of their immorality, or because
"they would, if committed, be crimes. So that the
"decision in *Ex parte* Sawyer, *supra*, whether we look
"solely to its text or the supporting authorities, is, as
"I have before stated, conclusive against complainant's
"contention.

"In addition to what has already been said, it may
"be appropriately observed that municipal and state
"regulations of saloons, beer halls, theaters and places
"of amusement generally, market places, slaughter
"houses, gas works, powder magazines, laundries,
"cemeteries, fire limits, streets (particularly obstruc-
"tions, railway tracks, telegraph poles, pipe lines, etc.,
"therein), indeed of all establishments, trades, and oc-
"cupations subject to the police power of the state,—
"unavoidably affect property rights, and are usually
"rendered effective by making their violations punish-
"able offenses. Now, if there were such jurisdiction
"as that for which complainant contends, every
"controversy over the validity of an ordinance or
"statute relating to any of the matters enumerated
"would furnish an occasion for interference by injunc-
"tion; and thus would be presented the remarkable
"situation of courts of equity, state and federal, exer-
"cising supervisory power over the administration of
"a part, not inconsiderable, of the criminal laws of
"the country.

"The jurisdiction asserted by complainant does not,
"in my opinion, exist, and for that reason the tempo-
"rary injunction applied for will be refused."

Davis & Farnum Mfg. Co. v. City of Los Angeles,
115 Fed. 537

We desire now to call the attention of the court to two cases cited by appellant's counsel in their brief, and relied upon by them as decisive of the unconstitutionality of this ordinance.

The first is the case of the City of Buffalo v. Chadeayne, 31 N. E. Rep. 443, and cited in their brief at page 86. The facts of that case were as follows: The City of Buffalo by ordinance established a certain fire district and gave a citizen of said city a permit to erect seven frame buildings within that district; after he had obtained said permit and laid the foundations for the buildings, the city passed an ordinance changing the district and purporting to make it unlawful to erect such buildings at the point where these were being erected.

With one exception, the case was parallel to the one at bar. But that exception is a material and vital one. The exception is that no such delegation of the "police power" had been made to the City of Buffalo by the State of New York as has been granted to the City of Los Angeles by Art. XI., Sec. 11, of the Constitution of the State of California.

The court, in rendering its opinion, says:

"It is claimed by the appellant that a municipal board "may reconsider its action at any time before private "vested rights have resulted from such action, and that "the defendant could not acquire vested rights as "against the police power of the state or municipality. *"For the purposes of this case we may concede these propositions.* As to the first, it appears,as we have seen, "that the defendant had entered upon the construction "of his buildings, had made contracts, and incurred lia-"bilities thereon, before the Common Council attempted "to reconsider its action, giving him a permit to con-"struct of wood. A private property right had, there-"fore vested in him prior to the rescission of the resolu-"tion. *As to the second, his right may be subject to "the police power of the state, but the difficulty is that "the state has not seen fit to deprive him of such right*

"by the exercise of such power, nor has it delegated the "same to the municipality."

From a perusal of the above quotation, it is plain that the decision of the Supreme Court declaring such ordinance invalid was made to depend not upon the theory that it was beyond the power of the state to pass such a law, but on the fact that the State of New York, in which the "police powers" naturally inhere, had not, prior to the enactment of said ordinance, delegated "general police powers" to the City of Buffalo, and that the police powers that had been delegated to the said city by the state prior to the enactment *were not sufficiently plenary to authorize it to pass the ordinance in question.* The court as much as says that petitioner's right to finish the erection of said buildings was subject to the "police powers" of the state. So that we see that the said case of The City of Buffalo v. Chadeayne, instead of supporting the contention of petitioner, is really in direct conflict with it.

The other case that we desire to call the attention of the court to is the case of Barthet v. City of New Orleans, reported in 24 Federal Rep. 563, and cited by appellant at page 84 of its brief.

The facts of said case were as follows: The plaintiff Barthet erected a slaughtering house and established a slaughtering business in the City of New Orleans under an ordinance that permitted him so to do. Afterwards the City of New Orleans enacted an ordinance making it unlawful to carry on the slaughtering business in the district wherein Barthet's slaughter house was situated, *"except permission be granted "by the council of the City of New Orleans."* The

court will see at once that by the addition of the clause, *"except permission be granted by the council of the "City of New Orleans,"* the council destroyed the *equal and undiscriminating and general application* of the law embodied in the ordinance, and attempted to make the right of Barthet, and indeed of any other person who wished to engage in the slaughtering business, depend upon the mere whim and caprice of the council. Because of this obnoxious clause of the ordinance the Circuit Court of the United States rightfully declared the ordinance invalid. The court, in its opinion, says: "The amendment of May 19th *is, we think, "unconstitutional, in the fact that if it is carried out, as "the City Attorney admits it will be, it will make Bar-"thet's right* to engage in a lawful business dependent "on the arbitrary will of an individual or a body of in-"dividuals acting for the city. * * * The right "to grant permission to A to carry on his lawful busi-"ness carries with it necesarily the power to deny per-"mission to B to exercise the same privilege. The com-"plainant is entitled, in common with all persons, to "equal protection. Applying this principle to this case, "Barthet is entitled to carry on his trade within the "limits already laid out by the city in pursuance of the "articles herein cited. *If the city council, as the matter "now stands, can prevent him from so doing, simply "because he has not their permission, then he has not "that equal protection of the law granted in the Con-"stitution."*

So the court will perceive that this case does not hold that the City of New Orleans could not, under its "police powers," enact an ordinance that would make it unlawful for Barthet to carry on his business at the point where his establishment was situated. Nor does it hold that the ordinance was unconstitutional

because it impaired any vested right of Barthet, but on the contrary, it declared that the invalidity of the ordinance consisted in the fact that the application depended upon the mere will of individuals.

THE ENACTMENT OF ORDINANCE NO. 7029 (NEW SERIES) IS FULLY WITHIN THE POLICE POWERS DELEGATED TO THE CITY OF LOS ANGELES BY THE STATE.

The validity of this ordinance is assailed by appellant on several grounds, which we will enumerate and discuss later herein. Our contention is that said ordinance was passed by the city council in the exercise of its police powers granted to it by the constitution of the State of California, by its charter and by the general laws of the state.

In arriving at a decision as to the validity of this ordinance the court must consider it in connection with and look at it in the light of those facts and circumstances which the law says the court may take judicial cognizance of. The decisions both state and federal are uniformly to this effect. Some of them we quote hereafter. Now let us see what these facts and circumstances are, of which the court may take judicial cognizance. We do not propose to attempt to enumerate them all, but the most important ones are: That the City of Los Angeles is a large city, having more than 100,000 inhabitants; that portions of the city are devoted to residence purposes exclusively,

and such portions are densely populated; that the district described in Ordinance No. 7029 embraces more than two square miles of territory; that gas is an extremely volatile, inflammable, combustible and explosive, poisonous substance; that its manufacture is attended with noxious smoke in great quantities and extremely offensive odors deleterious alike to the health and comfort of all persons living in the immediate vicinity of the works; that the storage of it in any considerable quantity is a constant menace to all buildings adjoining or in close proximity, as the learned judge in the case of Cleveland v. Citizens' Gas Light Co., 20 N. J. Eq. at page 205 says.

"Any business, however lawful, which causes an-
"noyances that materially interfere with the ordinary
"comfort, physically, of human existence, is a nuisance
"that should be restrained; and smoke, noise and bad
"odors, even when not injurious to health, may render
"a dwelling so uncomfortable as to drive from it any
"one not compelled by poverty to remain.

"*Unpleasant odors, from the very constitution of*
"*our nature, render us uncomfortable, and when con-*
"*tinued or repeated make life uncomfortable. To live*
"*comfortably is the chief and most reasonable object of*
"*men in acquiring property as the means of attaining*
"*it; and any interference with our neighbor in the com-*
"*fortable enjoyment of his life, is a wrong which the*
"*law will redress.* The only question is what amounts
"to that discomfort from which the law will protect.

"The discomforts must be physical, not such as de-
"pend upon taste or imagination. But whatever is
"offensive physically to the senses, and by such offen-
"siveness makes life uncomfortable, is a nuisance; and
"it is not less so because there may be persons whose
"habits and occupations have brought them to endure
"the same annoyances without discomforts. Other per-
"sons or classes of persons whose senses have not

"been so hardened and who by their education and "habits of life retain the sensitiveness of their natural "organization, are entitled to enjoy life and comfort as "they are constituted. The law knows no distinction "of classes, and will protect any citizen or class of citi- "zens from wrongs and grievances that might perhaps "be borne by others without suffering or much incon- "venience. * * * With regard to the coal tar, the "ammoniacal water and other liquid products of the "manufacture of gas, the cistern and plan for convey- "ing them to it and emptying them from it, if it can be "and shall be faithfully carried out, may prevent the "effluvia that usually arises from these sources.

"I cannot say that it will not; at least I cannot, "from any evidence in the case, or from any facts or "principles from which I may be entitled to take cog- "nizance. The plan seems to me not only ingenious "but sensible and plausible. *Yet the subtle and pene- "trating nature of the effluvia that attends the manu- "facture of gas is so great that I have doubt of the "experiment until demonstrated by success.* * * *

"And I wish to be understood that while I say it is "not shown to me to be impossible to manufacture gas "at the distance proposed from the buildings of the "complainant without material annoyance, yet I much "doubt if it will ever be done in practice. Many things "scientifically and theoretically possible are never ac- "complished in practice."

Now, looking at this ordinance in the light of the foregoing circumstances, let us see if the City of Los Angeles has authority to enact it, or if it is obnoxious to any constitutional provision, or to any general law of the state. We contend that the city derives its power to enact this ordinance, from three sources, any one of which would be sufficient authority:

1st. From the Constitution of the State of California, Section 11, Article XI, which reads as follows:

"ANY COUNTY, CITY, TOWN OR TOWNSHIP MAY "MAKE AND ENFORCE WITHIN ITS LIMITS ALL SUCH "LOCAL, POLICE, SANITARY AND OTHER REGULATIONS "AS ARE NOT IN CONFLICT WITH GENERAL LAWS."

2d. From the charter of Los Angeles city, the sections of which appertaining thereto are as follows:

Article I, Section 2 of the charter provides as follows:

"THE SAID CORPORATION SHALL HAVE THE "POWER . . . . . (SUB. 22) TO MAKE AND EN- "FORCE WITHIN ITS LIMITS SUCH LOCAL, POLICE, SAN- "ITARY AND OTHER REGULATIONS AS ARE NOT IN "CONFLICT WITH GENERAL LAWS, AND ARE DEEMED "EXPEDIENT TO MAINTAIN THE PUBLIC PEACE, PRO- "TECT PROPERTY, PROMOTE THE PUBLIC MORALS, "AND TO PRESERVE THE HEALTH OF ITS INHABIT- "ANTS." (STATUTES 1889, P. 458) . . . . . (SUB. 13) "TO LICENSE AND REGULATE THE CARRYING ON OF "ANY AND ALL PROFESSIONS, TRADES, CALLINGS AND "OCCUPATIONS CARRIED ON WITHIN THE LIMITS OF "SAID CITY . . . AND TO SUPPRESS AND PROHIBIT " . . . . . THE KEEPING OF BEES WITHIN THE "CITY LIMITS AND ANY AND ALL OBNOXIOUS, OF- "FENSIVE, IMMORAL, INDECENT, OR DISREPUTABLE "PLACES OF BUSINESS OR PRACTICE." (STATUTES 1889, 457) . . . . . (SUB. 23) "TO EXERCISE ALL "MUNICIPAL POWERS NECESSARY TO THE COM- "PLETE AND EFFICIENT MANAGEMENT AND CONTROL "OF THE MUNICIPAL PROPERTY, AND FOR THE EFFI- "CIENT ADMINISTRATION OF THE MUNICIPAL GOVERN- "MENT, WHETHER SUCH POWERS BE EXPRESSLY "ENUMERATED OR NOT, EXCEPT SUCH POWERS AS "ARE FORBIDDEN OR ARE CONTROLEED BY GENERAL "LAWS." (STATUTES 1889, P. 458.)

Section 27 of the Article III of the charter pro provides as follows:

"IT (THE COUNCIL) SHALL BY ORDINANCE, REGU-
"LATE, AND MAY PROHIBIT THE KEEPING OF GUN
"POWDER, ACIDS, OR OTHER EXPLOSIVE, COMBUSTI-
"BLE OR INFLAMMABLE MATERIAL WITHIN THE
"LIMITS OF THE CITY, OR ANY SPECIFIED PART
"THEREOF."

Section 40 of Article III of the charter provides as follows:

"THE COUNCIL SHALL ALSO HAVE FULL POWER
"TO PASS ORDINANCES UPON ANY OTHER SUBJECT
"OF MUNICIPAL CONTROL OR TO CARRY INTO EFFECT
"ANY OTHER POWERS OF THE MUNICIPALITY." (STAT-
UTES 1889, P. 465.)

3d. From the general laws of our state with reference thereto, which read as follows:

Subdivision four of the act of the legislature for the year 1869-70, found in the statutes of 1869-70 at page 815; also in Deerings Penal Code of the State of California at page 579, provides as follows:

"LOCATION OF WORKS.

"SEC. 4. IN ADDITION TO THE FOREGOING PRO-
"VISIONS THE AUTHORITIES OF SUCH TOWNS AND
"CITIES SHALL AFFIX TO EVERY LICENSE OR CON-
"TRACT SUCH CONDITIONS AS WILL BE FOR THE BEN-
"EFIT OF THE PUBLIC, AND MAY SECURE THEIR EN-
"FORCEMENT BY ANY ORDERS OR ORDINANCES
"WHICH THEY MAY DEEM NECESSARY. THEY MAY
"ALSO CONTROL THE LOCATION AND CONSTRUCTION
"OF WORKS, SO THAT THEY MAY BE ERECTED IN SUIT-
"ABLE LOCALITIES TO GIVE THE LEAST DISCOMFORT
"OR ANNOYANCE TO THE PUBLIC."

This was an act relating to gas companies and gas works, and was expressly continued in force by subdivision 20, section 19, of the Political Code of this state.

Section 4413 of the Political Code of our state provides as follows:

"IN GRANTING AUTHORITY TO LAY DOWN PIPES, "AND IN CONTRACTING FOR GAS AND WATER, THE "COMMON COUNCIL MUST IMPOSE SUCH RESTRIC- "TIONS AND CONDITIONS AND PROVIDE FOR SUCH LO- "CATIONS AND CONSTRUCTION OF GAS AND WATER "WORKS AND PIPES AS TO WORK THE LEAST POSSI- "BLE PUBLIC OR PRIVATE INCONVENIENCE, AND PRO- "VIDE FOR ENFORCING SUCH RESTRICTIONS AND "CONDITIONS"

The question now to be determined is whether or not this ordinance is a valid ordinance and can be enforced against any person. If it can be lawfully enforced against a person who subsequent to the enactment thereof has purchased a piece of property without the district described in said ordinance and who is making preparations for the erection and maintenance of gas works thereon then it is a constitutional ordinance, and admitting for the sake of argument that appellant herein might have some vested right by reason of a permit from the fire commissioners to erect gas works without said district described in said ordinance or some other constitutional defense that would take it without the operation of it, still that would not render the ordinance unconstitutional or invalid or preclude the city from enforcing it against persons who had no such permit and who had not secured vested rights prior to its enactment. Assum-

ing thefact that prior to the enactment of ordinance No. 7029, a permit had been granted to erect these works and that Mrs. Dobbins had prior to the enactment of said ordinance expended a great amount of money in the erection of said works, would those facts forever preclude the city from enacting an ordinance changing the boundaries of the district as it stood at the time the permit was granted and the money was expended by Mrs. Dobbins? Such would seem to be the contention of appellant. But this contention does not commend itself to us as sound law or good common sense.

Let us illustrate: Suppose John Doe had come to Los Angeles yesterday and purchased a piece of property without the district described in ordinance No. 7029 and this morning begun to erect gas works thereon, could he, on being arrested this afternoon for violating the provisions of said ordinance, come into court and have it declared unconstitutional and invalid because it impaired some vested right Mrs. Dobbins claimed to have by reason of a permit such as appellant sets up? To us it seems plain that he could not. If Mrs. Dobbins herself were threatened with arrest for violating this ordinance, and were to immediately bring an action to restrain the city from enforcing the ordinance, alleging the ordinance to be unconstitutional, would this court, in order to determine the constitutionality of the ordinance, prior to her arrest and trial, take evidence, or permit her to introduce evidence, to ascertain if she had secured a permit to erect said works prior to the enactment of the ordinance, or expended a great amount of money on

said works, prior to said enactment? We apprehend not. We think this court would say to her that those would be matters of defense to be pleaded and proved by her, and that they could not affect the constitutionality or validity of the ordinance. Even if such permit constituted a perfect defense, there is nothing on the face of this ordinance that says it shall apply to any one who has, prior to its enactment, secured a permit to erect gas works outside of the district described in said ordinance. The ordinance is such a one as falls within the police powers of the city to enact, and *there is nothing on the face of it, or in the range of matters of which this court can take judicial cognizance, that would warrant the court in declaring it unconstitutional or invalid.*

In support of our views on this branch of the case we cite the court to the following authorities:

"Many powers exercised by municipalities fall with-
"in what is known as the police power of the state,
"and are delegated to them to be used for the public
"good. Of this nature is the authority to suppress
"nuisances, preserve health, prevent fires, to regulate
"the use and storage of dangerous articles, to establish
"and control markets and the like. * * * Laws
"and ordinances relating to the *comfort, health, con-*
venience, good order and *general welfare of the in-*
"habitants are comprehensively styled police laws or
"regulations."

Dillon on Municipal Corporations, 4 Ed. Sec. 141, vol. I, page 212.

Chancellor Kent, at page 340, Vol. 11 of his Commentaries, in speaking of the extent of police powers, says: "*Unwholesome trades*, slaughter houses, *oper-*

"*ations offensive to the senses,* the deposit the powder, "etc., may all be interdicted by law in the midst of "dense masses of population on the general and ra- "tional principle that every person ought so to use his "property as not to injure his neighbors, and that pri- "vate interests must be made subservient to the gen- "eral interest of the community," which is cited and "approved in Butchers' Union etc. v. Crescent City, "111 U. S. 746, book 28, L. Ed. 585, and Peelsplit "Coal Co. v. West Va., 17 L. R. A. 392."

See same and further definition in

Slaughterhouse cases, 16 Wallace 62; s. c. 21 L. Ed. 404.

Can it, we ask, be doubted that the manufacture of gas is an unwholesome trade and an offense to the senses? If it be an unwholesome trade and offensive to the senses, then, according to Chancellor Kent, it is within the "police power" of the city to regulate it, and even to interdict it.

"Under the general power to pass any other by-laws "for the well-being of the city, its council may by ordi- "nance prohibit saloons, restaurants and other places "of entertainment to be kept open after 10 o'clock at "night. The objection that such a by-law was unrea- "sonable and deprived the citizen of the constitutional "right of acquiring property were not considered to be "well taken. It regulates, but does not deprive the "party of his rights. *Under similar powers an ordi- "nance confining the carrying on of the laundry busi- "ness to a certain portion of the city is a police regu- "lation and reasonable."*

Dillon Mun. Cor. 4 Ed. Vol. I, Sec. 400.

THE CITY OF LOS ANGELES UNDER ITS POLICE POWER WAS AUTHORIZED TO ENACT AND ENFORCE ORDINANCE NO. 7029, IRRESPECTIVE OF THE QUESTION AS TO WHETHER OR NOT GAS WORKS ARE A NUISANCE *PER SE*.

"The legislature under our system has power to "repress whatever is hurtful to the public good and is "generally the exclusive judge of what is or is not hurt-"ful, the only limitations being those prescribed in the "constitution. Subject to those limitations the legisla-"ture has not only the power to regulate but the power "to suppress particular branches of business deemed by "it immoral and prejudicial to the general good. It "seems to be admitted in argument that if slaughter "houses were nuisances *per se*, the order would not be "obnoxious to the constitutional objection now under "consideration. A nuisance *per se* as used in argument, "is a nuisance which the judge can declare to be such "without inquiry into extrinsic facts; that is to say, a "nuisance by enumeration rather than by definition. The "question presented is one of legislative power, and we "are not aware that the limits of that power are to be "determined in any case by the mere vigor of common "law definitions or categories. The legislature can add "to the *mala in se* of the common law the *mala prohibita* "of its own behest. Common law definitions or sched-"ules so far from being limitations upon legislative "power here, are the most familiar subjects of legisla-"tive action. While the general terminology of the law "is very rarely interfered with, nothing is more com-"mon than the enlarging or narrowing by the legisla-"ture of the import of common law terms. Aside from "this the order in question does not find the facts, *nor "does it follow that it proceeds upon the idea that the "slaughtering business would be a nuisance in the full "legal sense, if carried on within the prohibited limits.*

"The power to regulate or prohibit conferred upon the "board of supervisors not only includes nuisances but "extends to everything expedient for the preservation "of the public health and the prevention of contagious "diseases. Now there are many things not coming "up to the full measure of common law or statute nui- "sance, that might both in the light of scientific tests "and of general experience pave the way for the intro- "duction of contagion and its uncontrollable spread "thereafter. Slaughter houses, as ordinarily and per- "haps invariably, conducted in this country, might, "within the limits of reasonable probability, be at- "tended with these consequences. A competent leg- "islative body has passed upon the question of facts "involved and we cannot go behind the findings. So "far as we know on this record the power conferred "has been exercised intelligently and in good faith. * "* * The sovereign power in a community may and "ought to prescribe the manner of exercising individual "rights over property. * * * In England the "power in question has been exercised by the legisla- "tive department of the government, sometimes di- "rectly, but more frequently through the intervention "of municipal corporations, from the highest antiquity. "And in the United States, where legislative power "has ever been subjected to constitutional restraints, "the public judgment has never been so far misguided "as to deny to legislative bodies *a power without which "there would be few social or common rights which in- "dividual caprice or rapacity would be bound to re- "spect.*"

Ex parte Schrader, 33 Cal. 283

The above we quote from the opinion of the court on habeas corpus brought by the petitioner Schrader who had been convicted for the violation of the order of the board of supervisors of the city and county of San Francisco which provided as follows:

"No person shall establish or maintain a slaughter house, etc.," without a certain district described in said

ordinance. The said Schrader claimed in his petition, and also his argument before the court, that the said ordinance was in contravention of his constitutional rights, and that the board of supervisors had no right to pass the ordinance because the slaughter house was not *per se* a nuisance. The same contention is made by appellant here, that the City of Los Angeles has no right to pass such ordinance prohibiting the erection or maintenance of gas works without a certain district of the City of Los Angeles because, they say, that said gas works are not and would not be or constitute a nuisance *per se* if completed, and that the city council has no right or power to suppress or restrict to certain limits the erection and maintenance of anything except such business or buildings as constitute nuisances *per se*. Without admitting that gas works, with their attendant smokes, fumes, noxious odors, coke ovens and the effluvia from their scrubbers and washers would not constitute a nuisance *per se*, still we say that from the decision of this case last above quoted down to and including the decision of the Supreme Court of California in *Ex parte* Lacy, 108 Cal. 326; that court has constantly held that a city could under its police powers delegated to it under Article XI, Section 11 of the constitution of this state, prohibit and restrict within certain districts all unwholesome, noxious, offensive and dangerous trades and businesses.

We now desire to invite the court's particular attention to the case last above mentioned, *Ex parte* Lacy, 108 Cal. 326:

The hearing in the Supreme Court was to secure pe-

titioner's discharge from a judgment of imprisonment of the police court of the City of Los Angeles. The opinion of Justice Garoutte is as follows:

"The petitioner has been convicted and imprisoned "for violating a city ordinance of the City of Los An- "geles, which provides, 'No person or persons shall es- "tablish or conduct any steam shoddy machine, or "steam carpet beating machine, within one hundred "feet of any church, school house, residence, or dwell- "ing house.' He now alleges the judgment void upon "the ground that the ordinance is void, and seeks his "release by a writ of habeas corpus. He claims the "ordinance void upon the ground that it interferes with "certain of his inalienable rights vouchsafed to him by "the Constitution. Upon the part of the city it is "claimed that the passage and enforcement of the or- "dinance is but the exercise of a police power granted "to it in terms by the constitution of the state. The "constitution of the State of California, Article XI, "Section 11, provides: 'Any county, city, town or "township may make and enforce, within its limits, "all such local, police, sanitary, and other regulations "as are not in conflict with general laws.' It will thus "be observed that Los Angeles city is vested with "certain powers by direct grant from the constitution, "and *that grant of power is not confined within narrow "limits, but is broad and far reaching in its scope and "effect. Under this grant of power the city had the "right to pass this ordinance*, unless it is in conflict with "general laws; and we know of no general laws which "conflict with it, unless it can be said to be violative of "those general principles of constitutional liberty which "form the very foundation of both state and federal "constitution. We see nothing in the language of this "ordinance contrary to these great principles of our "government. We see nothing there depriving peti- "tioner of any fundamental rights. In the exercise of "its police and sanitary power the city has attempted "to regulate the business of beating carpets by steam "power. *Under its constitutional grant it had the right "to regulate this business.* The use of steam power of

"itself, within municipal territory, has always been "recognized as the proper subject of regulation; and, "in addition here, it may well be assumed that the dust "and other disagreeable and unhealthy matters aris- "ing in such quantities from the beating of the carpets, "as would naturally be indicated by the use of steam "power, are a constant source of danger and menace "to the good health and general welfare of the neigh- "borhood where located.

"*Conceding the business covered by the provisions "of this ordinance not to constitute a nuisance per se "and to stand upon different grounds from powder fac- "tories, street obstructions and the like, still the case is "made no better for the petitioner. This is not a ques- "tion of nuisance per se, and the power to regulate is "in no way dependent upon such conditions. Indeed, "as to nuisances per se, the general laws of the state are "ample to deal with them. But the business here in- "volved may properly be classed with livery stables, "laundries, soap and glue factories, etc., the class of "business undertakings in the conduct of which the "police and sanitary regulations are made to a greater "or less degree* by every *city in the country. And in "this class of cases it is no defense to the validity of "regulation ordinances to say: 'I am committing no "nuisance, and I insist upon being heard before a court "or jury upon that question of fact.* In this class of "cases a defendant has no such right. To the extent "that it was material in creating a valid ordinance we "must assume that such question was decided by the "municipal authorities and decided against the peti- "tioner and all others similarly situated. * * * *

"This ordinance is not unreasonable or arbitrary nor "discriminating. It treats all persons alike who are en- "gaged in the business named therein. All have the "same rights and all are subject to the same burdens. "It is not unreasonable in the limits of distance fixed. "As to the location of the exact spot distant from a "church or a school house or a dwelling house where "an ordinance would cease to be reasonable it is not "for this court now to say. The limits here prescribed "are those with which we are to deal, and those limi-

"tations of distance may well be said to be reasonable. "We see no substantial objection which can be made "to the validity of this ordinance. Upon the contrary, "the subject matter covered by it is clearly one with "which the city had the constitutional right to deal, "and the businesses there enumerated are unmistak- "ably those which the municipal authorities had the "right to regulate in the interest of the comfort and "good health of the people of the city. The power is "vested in the city by direct grant from the constitu- "tion to control and regulate business undertakings of "the character here involved, and petitioner's constitu- "tional rights have in no way been trespassed upon."

The two cases last cited seem to us to effectually dispose of the appellant's contention herein: That the City of Los Angeles does not have authority to enact an ordinance regulating and restricting a business to a certain limited district unless the business was a nuisance *per se*, and also its contention that it has a right to prove that the business of gas making and storing as it proposes to carry it on would not in effect be a nuisance or cause of annoyance to the neighborhood in which said works are situated.

"The mayor and city council are but trustees of the "public; the tenure of their office impressed their ordi- "public; the term of their office impressed their ordi- "nances with liability to change. They could not, if they "would, pass an irrevocable ordinance. The corpora- "tion cannot abridge its own legislative powers."

State v. Graves, 81 Am. Dec. 639.

"It is true that the right to acquire property may "be regarded as one of those which is inherent in man; "but this right, which took its rise in the law of na- "ture, has received its perfection, and had a perma- "nency given to it by municipal or civil law; and it is "in relation to this law that the right of individuals "to the possession and enjoyment of things must be ex-

"amined. The modifications which legislative power "may make in the possession, use, and distribution of "property are infinite; and nearly every contest which "arises in courts of justice proceeds from the real or "imputed violation of some one of those modifications; "any one of which might be urged to be a violation of "natural law, with as much reason as that of which the "appellant now complains. Our code defines absolute "ownership to be that which gives the right to enjoy "and dispose of one's property in the most unlimited "manner; provided it is not used in a way prohibited "by laws or ordinances. The cases read by the appel- "lant's counsel from the common law books certainly "go to show that an establishment, such as that con- "templated by the parties to this action, at the time "the lease was made, would not be illegal in countries "governed by that jurisprudence. *But the authority of "the city council to make the regulations complained "of cannot be tested by the principles of common law "in relation to nuisances. No such guide is given to "them by the charter. No such limit can be inferred "from the motives which we must suppose induced "such a grant of power; nor from the language by "which it is conferred.* The police of cities require "many regulations which grow out of their situation, "their climates and their populations; and many things "which would not amount to a nuisance at common "law, might be hurtful here."

Milne v. Davidson, 16 A. M. Dec. 189.

"There is no doubt of the general proposition that "a man may do what he will with his own, but this "right is subordinate to another, which finds expres- "sion in the familiar maxim: *Sic utere tuo ut alienum "non laedas.* His right to erect what he pleases upon "his own land *will not justify* him in maintaining a "nuisance or in carrying on a business *or trade that is "offensive to his neighbors.* Ever since Aldreds' case, "Coke Rep. page 57, it has been the settled law, both "of this country and of England, that *a man has no "right to maintain a structure upon his own land, "which by reason of disgusting smells, loud or unusual*

"noises, thick smoke, noxious vapors, the jarring of "machinery, or the unwarrantable collection of flies, "renders the occupancy of adjoining property danger- "ous, intolerable *or even uncomfortable* to its tenants. "* * * *The police power is not subject to any def- "inite limitations, but is co-extensive with the necessi- "ties of the case and the safeguard of public interests."*

Camfield v. U. S. 518.

In the case of Crowley v. Christensen, 137 U. S., page 87, Book 34 L. Ed. 620, Mr. Justice Field says:

"It is undoubtedly true that it is the right of every "citizen of the United States to pursue any lawful trade "or business, under such restrictions as are imposed "upon all persons of the same age, sex, and condition. "But the possession and enjoyment of all rights are "subject to such reasonable conditions as may be "deemed by the governing authority of the country "essential to the safety, health, peace, good order, and "morals of the community. Even liberty itself, the "greatest of all rights, is not unrestricted license to act "according to one's own will. It is only freedom from "restraint under conditions essential to the equal en- "joyment of the same rights by others. It is then lib- "erty regulated by law. The right to acquire, enjoy "and dispose of property is declared in the constitu- "tions of several states to be one of the inalienable "rights of man. But this declaration is not held to "preclude the legislature of any state from passing laws "respecting the acquisition, enjoyment and disposition "of property. What contracts respecting its acquisi- "tion and disposition shall be valid and what void or "voidable; when they shall be in writing and when they "may be made orally, and by what instruments it may "be conveyed or mortgaged, are subjects of constant "legislation. *And as to the enjoyment of property, the "rule is general that it must be accompanied with such "limitations as will not impair the equal enjoyment by "others of their property. Sic utere tuo ut alienum non "laedes is a maxim of universal application.* For the "pursuit of any lawful trade or business, the law im-

"poses similar conditions. Regulations respecting them "are almost infinite, varying with the nature of the "business. *Some occupations, by the noise made in their "pursuit, some by the odors they engender,* and some "by the dangers accompanying them, *require regula-"tions as to the locality in which they shall be con-"ducted.* Some of the dangerous character of the arti-"cles used, manufactured or sold, require, also, special "qualifications in the parties permitted to use, manu-"facture or sell them."

"The ordinance of the city and county of San Fran-"cisco prohibiting the carrying on of public laundries "and wash houses within certain prescribed limits of "the city and county from 10 o'clock at night until 6 "o'clock in the morning, is purely a police regulation, "within the competency of any municipality possessed "of the ordinary powers to make."

(Syllabus) Barbier v. Connolly, 113 U. S. 27.

"The rule is general with reference to the enactment "of all legislative bodies, that the courts cannot in-"quire into the motives of the legislators in passing "them except as they may be disclosed on the face of "the acts or inferable from their operation considered "with reference to the condition of the country and ex-"isting legislation."

Hing v. Cowley, 113 U. S. 703.

We especially commend to the attention of the court the two cases last cited.

"Any business however lawful in itself which as "to those residing in the neighborhood where it is car-"ried on causes annoyances that materially interfere "with the ordinary physical comfort of human exist-"ence, is a nuisance that should be restrained. *Smoke, "noise or bad odors even when not injurious to health "cause a discomfort against which the law will pro-"tect."*

Cleveland *et al.*, v. Gas Light etc., 20 N. J. 201.

"City has right under police powers to establish, "regulate, control and limit markets to certain dis- "tricts, hours, etc."

Dillon Mun. Corp., 4th Ed. Vol. 1, p. 472.

Note to City of Jacksonville v. Ledwith, 23 Am. St. Rep. 581.

Ex parte Byrd, 4 Am. St. Rep. 328.

"The prevention of damage by fire is usually an ob- "ject within the scope of municipal authority, either "by express grant or by the power in a chartered town "or city to make police regulations or needful by-laws. "Under such power it may establish fire limits, pre- "vent the erection of wooden buildings, regulate the "mode and removal of ashes, and make any other rea- "sonable regulation to prevent and extinguish fires."

Dillon on Mun. Corporations, 4 Ed Vol. 1, Sec. 143, page 216.

Why cannot the legislature prevent not only wooden buildings but gas works much more dangerous?

"There can be no question as to the propriety of "superintending and regulating the erection and altera- "tion of buildings in the city, so far as to see that they "conform to the regulations for preventing fire. This "is demanded for the safety and welfare of the public "at large, and especially of residents and property hold- "ers in the city. This duty is imposed upon the fire "marshal. In order that he may discharge it thor- "oughly and systematically, it is essential that he should "know what buildings are to be built or altered and "by whom, the mode of construction, the materials to "be used, the location and dimensions of the buildings "when complete, *and the purpose for which they are "to be used.*"

Welch v. Hotchkiss, 12 Am. Rep. 385.

"A power conferred upon a city to regulate the erec- "tion, use and continuance of slaughter houses within

"the city, *includes the power of total prohibition in cer-*
"tain specified limits."

Cronin v. People (N. Y.) 37 Am. Rep. 564.
Milwaukee v. Gross, 91 Am. Dec. 472.

Mr. Tiedeman in his work on "Police Powers," volume 2, at page 740, says:

"Where therefore certain trades and employments "which serve some useful purpose and adds something "to the world's wealth are harmful to the inhabitants "of the locality in which they may be conducted; and "the harm may be avoided altogether or considerably "reduced by confining them to localities in which the "population is sparse and the residences are few; it is "altogether permissible to prohibit the prosecution of "these trades in other localities. The instances of this "kind of regulation are very numerous. Slaughter "houses have been confined to certain localities, the "sale of fresh meat *and vegetables* has been prohibited "except in public markets, where the articles ex-"posed for sale may be conveniently inspected. In the "same way may the *manufacture of pressed hay*, the *"maintenance of dairies*, the cultivation of land within "the limits of a town, *and the storage of cotton and "other combustible material*, such as *oil* and gun pow-"der, be prohibited in densely settled parts of the city, *"and the prosecution of such trades* be confined to cer-"tain less dangerous localities."

Now to us it seems plain that if a city has the right under the exercise of its "police power" to confine "the sale of vegetables," the "manufacture of pressed hay," the "maintenance of dairies," the "storage of cotton and oil" and "such trades" to definite localities, that it certainly has equally as good right under the exercise of its said "police power" to confine the manufacture and storage of gas to within a definite locality. For there can be no doubt that the manufacture and stor-

age of gas is vastly more dangerous to life and property and a greater menace to the *health and comfort* of the neighborhood wherein it is carried on than any of the occupations enumerated by Mr. Tiedeman in his work as above quoted. Certainly it can not be successfully claimed that the manufacture of pressed hay is any more dangerous to *health* or *comfort* than the manufacture of gas, nor can it be said that the storage of oil is any more dangerous than the storage of gas. We would infinitely prefer to reside in the neighborhood of a fresh vegetable market, or a meat market than to reside in the neighborhood of a gas works.

"An ordinance of the city of Sacramento prohibiting "the slaughtering of animals or the maintenance of "slaughter houses within the city is valid."

(*Syllabus*) *Ex parte* Heilborn, 65 Cal. 609.

We believe that in the light of the foregoing authorities it is clear that the city has the right under the "police power" granted to it by Art. XI, Sec. 11, of the Constitution of the State of California, to regulate the business of manufacturing and storing gas within its limits and even in the absence of the grant from the constitution we think it is beyond question that the power delegated to the city by the legislature through the general laws of the state, and the provisions of its charter that we have quoted in plenary to enable it to enact the said ordinance No. 7029. The ordinance in question does nothing more than to restrict the erection and maintenance of gas works to a certain district within the said city, and such a restriction is nothing more than a simple and necessary regulation of the bus-

iness of manufacturing and storing of gas, *a business which by reason of the noxious, offensive and poisinous odors, vapors and smoke, necessarily and invariably attendant upon the manufacture of gas and by reason of the inflammability, combustibility and explosive nature of the gas thus manufactured and stored, is a constant menace to the safety, health and comfort of all people in the neighborhood.*

We submit to the court that if this ordinance is not valid and constitutional, then there is no ordinance that the city could pass to restrict the manufacture and storage of gas to any certain district within its territory.

If this ordinance is unconstitutional, how, we ask this honorable court, could the City of Los Angeles frame and word an ordinance to restrict the manufacture and storage of gas to a certain portion of its territory that would be valid and constitutional?

Will it do to say that the city cannot so restrict the business of manufacturing and storing of gas? Will it do to say that the city has no power to prevent the erection of a gas works in the most populous and desirable residence portion of the city or on the most frequented business corner in the city?

This is the contention of counsel for appellant when narrowed down. We have an abiding faith that such is not the law.

We think the foregoing authorities establish the fact that the city had full power to enact the ordinance and that it is not invalid nor unconstitutional.

THE COURT IN DETERMINING THE VALIDITY OF THIS ORDINANCE CAN TAKE INTO CONSIDERATION ONLY THE *FACE OF THE ORDINANCE* AND SUCH FACTS AS THE COURT TAKES JUDICIAL COGNIZANCE OF.

The Supreme Court of the United States, in a case involving the questions involved here, Powell v. Commonwealth of Pennsylvania, 127 U. S., 678, Book 32, Law Ed., page 253, rendered the following decision:

"This writ of error brings up for review a judg-
"ment of the Supreme Court of Pennsylvania, sustain-
"ing the validity of a statute of that commonwealth re-
"lating to manufacture and sale of what is com-
"monly called oleomargarine butter. That judgment,
"the plaintiff in error contends, denies to him certain
"rights and privileges specially claimed under the
"Fourteenth Amendment to the Constitution of the
"United States. * * * * * * * * * *

"The plaintiff in error was indicted, under the last
"statute, in the Court of Quarter Sessions of the Peace
"of Dauphin County, Pennsylvania. The charge in
"the first count of the indictment is that he unlawfully
"sold, 'as an article of food,' two cases, containing five
"pounds each, of an article designed to take the place
"of butter produced from pure unadulterated milk or
"cream from milk, the said article so sold, as afore-
"said, being an article manufactured out of certain
"oleaginous substances and compounds of the same
"other than that produced from unadulterated milk or
"cream, and said article so sold, as aforesaid, being an
"imitation butter.' In the second count the charge is
"that he unlawfully had in his possession, 'with intent
"to sell the same, as an article of food, a quantity, viz.,
"one hundred pounds, of imitation butter, designed to
"take the place of butter produced from pure, unadul-
"terated milk or cream from the same, manufactured
"out of certain oleaginous substances, or compounds of
"the same other than that produced from milk or cream
"from the same.'

"It was agreed for the purposes of the trial, that "the defendant, on July 10, 1885, in the City of Har- "risburg, sold to the prosecuting witness, as an article "of food, two original packages of the kind described "in the first count; that such packages were sold and "bought as butterine, and not as butter produced from "pure, unadulterated milk or cream from unadulterated "milk; and that each of said packages was, at the time "of sale, marked with the words, 'Oleomargarine But- "ter,' upon the lid and side in a straight line, in Roman "letters half an inch long. It was also agreed that the "defendant had in his possession one hundred pounds "of the same article, with intent to sell it as an article "of food."

"This was the case made by the Commonwealth.

* * * * * * * * *

"It is immaterial to inquire whether the acts with "which the defendant is charged were authorized by "the statute of May 22, 1878, or by that of May 24, "1883. The present prosecution is founded upon the "statute of May 21, 1885; and if that statute be not in "conflict with the Constitution of the United States, "the judgment of the Supreme Court of Pennsylvania "must be affirmed.

"It is contended that the last statute is void in that "it deprives all coming within its provisions of rights "of liberty and property without due process of law, "and denies to them the equal protection of the laws; "rights which are secured by the Fourteenth Amend- "ment of the Constitution of the United States.

"It is scarcely necessary to say that if this statute "is a legitimate exercise of the police power of the state "for the protection of the health of the people, and for "the prevention of fraud, it is not inconsistent with that "amendment; for it is the settled doctrine of this court "that, as government is organized for the purpose, "among others, of preserving the public health and the "public morals, it cannot divest itself of the power to "provide for those objects; and that the Fourteenth "Amendment was not designed to interfere with the "execution of that power by the states." [*Mugler v. "Kansas*, 123 *U. S.*, 663 (31:211.) *Butchers' Union, "S. H. & L. S. L. Co. v. Crescent City, L. S. & S. H.*

"Co., 111 U. S., 746, 751 (28:585, 587.) Barbier v. "Connolly, 113 U. S., 27 (28:923.) Yick Wo. v. Hop- "kins, 118 U. S., 356 (30:220).]

* * * * * * * * *

"Whether the manufacture of oleomargarine, or im- "itation butter, of the kind described in the statute, "is, or may be, conducted in such a way, or with such "skill and secrecy, as to baffle ordinary inspection, or "whether it involves such danger to the public health "as to require, for the protection of the people, the "entire suppression of the business, rather than its regu- "lation in such manner as to permit the manufacture "and sale of articles of that class that do not contain "noxious ingredients, are questions of fact and of "public policy, which belong to the legislative depart- "ment to determine. *And it does not appear from the "face of the statute, or from any facts of which the "court must take judicial cognizance, that it infringes "rights secured by the fundamental law, the legisla- "tive determination of those questions is conclusive "upon the courts. It is not a part of their functions to "conduct investigations of facts* entering into ques- "tions of public policy merely, and to sustain or frus- "trate the legislative will, embodied in statutes, as "they may happen to approve or disapprove its deter- "mination of such questions. *The power which the "legislature has to promote the general welfare is very "great, and the discretion which that department of the "government has, in the employment of means to that "end, is very large.* While both its power and its "discretion must be so exercised as not to impair the "fundamental rights of life, liberty and property, and "while, according to the principles upon which our in- "stitutions rest, 'the very idea that one man may be "compelled to hold his life, or the means of living, or "any material right essential to the enjoyment of life, "at the mere will of another, seems to be intolerable "in any country where freedom prevails, as being the "essence of slavery itself,' yet, 'in many cases of mere "administration, the responsibility is purely political, "no appeal lying except to the ultimate tribunal of the "public judgment, exercised either in the pressure of

"public opinion or by means of the suffrage.'" [*Yick "Wo. v. Hopkins*, 118 *U. S.*, 370 (30:226.)]

"The case before us belongs to the latter class. The "legislature of Pennsylvania, upon the fullest investi- "gation, *as we must conclusively presume,* and upon "reasonable grounds, as must be assumed from the rec- "ord, has determined that the prohibition of the sale, "or offering for sale, or having in possession to sell, "for purposes of food, of any article manufactured out "of oleaginous substances or compounds other than "those produced from unadulterated milk or cream "from unadulterated milk, to take the place of butter "produced from unadulterated milk or cream from "unadulterated milk, will promote the public health, and "prevent frauds in the sale of such article. If all that "can be said of this legislation is that it is unwise, or "unnecessarily oppresive to those manufacturing or "selling wholesome oleomargarine, as an article of food, *"their appeal must be to the legislature, or to the "ballot-box, not to the judiciary.* The latter cannot "interfere without usurping powers committed to an- "other department of government. It is argued, in be- "half of the defendant, that if the statute in question "is sustained as a valid exercise of legislative power, "then nothing stands in the way of the destruction by "the legislative department of the constitutional guar- "antees of liberty and property. But the possibility of "the abuse of legislative power does not disprove its "existence. That possibility exists even in reference to "powers that are conceded to exist. Besides, the ju- "diciary department is bound not to give effect to statu- "tory enactments that are plainly forbidden by the Con- "stitution. This duty, the court has said, is always "one of extreme delicacy; for, apart from the necessity "of avoiding conflicts between co-ordinate branches of "the government, whether state or national, it is often "difficult to determine whether such enactments are "within the powers granted to or possessed by the "legislature. Nevertheless, if the incompatibility of "the Constitution and the statute is clear or palpable, "the courts must give effect to the former. And such "would be the duty of the court if the state legisla-

"ture, under the pretense of guarding the public health, "the public morals, or the public safety, should invade "the rights of life, liberty or property, or other rights, "secured by the supreme law of the land.

"The objection that the statute is repugnant to the "clause of the Fourteenth Amendment forbidding de- "nial by the state to any person within its jurisdiction "of the equal protection of the laws is untenable. The "statute places under the same restrictions, and sub- "jects to like penalties and burdens, all who manufac- "ture, or sell, or offer for sale, or keep in possession to "sell, the articles embraced by its prohibitions; thus rec- "ognizing and preserving the principle of equality "among those engaged in the same business. [*Bar- "bier v. Connolly*, 113 *U. S.*, 27 (28:923.) *Soon Hing "v. Crowley, Id.* 703 (28:1145.) *Missouri Pac. R. Co. "v. Humes*, 115 *U. S.*, 519 (29-465.)]

"It is also contended that the act of May 21, 1885, "is in conflict with the Fourteenth Amendment in that "it deprives the defendant of his property without that "compensation required by law. This contention is "without merit, as was held in *Mugler v. Kansas.*"

Powell v. Commonwealth of Pa , 127 U. S. 678.

We have thus far in dealing with the question of the validity or invalidity of this ordinance, been taking into consideration only the face of the ordinance, together with the facts of which the court takes judicial cognizance, such as "the size of the city, the density of its population, the danger attending the manufacture and storage of gas, etc., etc. And we think that the authorities heretofore cited fully bear us out in our contention that there is nothing appearing on the face of the ordinance or in the facts of which the court takes judicial cognizance that renders said ordinance invalid or unconstitutional.

We come now to a discussion of certain other facts which appellant has alleged in his bill in equity and

which its counsel claim render the ordinance invalid, such as the allegations:

1st—That Mrs. Dobbins, for whom appellant was erecting said gas works, had, prior to the enactment of ordinance No. 7029, obtained a permit from the Board of Fire Commissioners of Los Angeles City to erect said gas works.

2nd—That Mrs. Dobbins, by reason of having purchased certain property for the purpose of erecting gas works, and having obtained a permit from the Board of Fire Commissioners of Los Angeles to build such gas works, and having entered into contracts with various parties for the building of the same, all done prior to the enactment of said ordinance, became vested with certain interests in property and rights in contracts which are impaired by this ordinance.

3d—That appellant, by reason of having entered into a contract with the Valley Gas and Fuel Company prior to the enactment of the ordinance, became vested with certain rights which are impaired by the ordinance.

4th—That the ordinance is unreasonable; and

5th—That the members of the Common Council of the City of Los Angeles were actuated by bad motives in the adoption of said ordinance.

But before we proceed to the discussion of this branch of the case we desire to call the court's attention to the fact that it is the duty of the court to uphold the validity and constitutionality of this ordinance if legally possible.

"For our purposes we must assume that if a state of "facts could exist that would justify such legislation it "actually did exist when the statute now under consid-

"eration was passed. For us the question is one of "power, not of expediency. *If no state of circum-"stances could exist to justify such a statute then we "may declare this one void because in excess of the "legislative power of the state, but if it could we must "presume it did.*

"Of the propriety of legislative interference within "the scope of the legislative power, the legislature is "the exclusive judge."

Munn v. Illinois, 94 U. S. 113.

Peel Split Coal Co. v. W. Va., 17 L. R. A. 389.

And so we say in this case that if any state of facts can exist that would make the manufacture and storage of gas, noxious and offensive or a menace to the health, *safety or comfort* of the neighborhood in which it is manufactured and stored then the court must assume that such a state of facts does exist, *if the court can conceive of no state of facts* that would make the manufacture and storage of gas noxious or offensive or dangerous to the health, *comfort or safety* of a thickly populated neighborhood, then and only then would this court be justified in declaring this statute void. For you to have been in the neighborhood of a gas works while in operation would be worth to us more than all the argument we can present.

We will now resume our argument with reference to the foregoing allegations of appellant's bill, which counsel claim render this ordinance invalid. First, we will take up the question as to the effect of the permit which is alleged to have been granted to Mrs. Dobbins by the Board of Fire Commissioners.

It is the contention of appellant's counsel that by reason of the fact that the Board of Fire Commission-

ers, prior to the enactment of this ordinance, granted Mrs. Dobbins a permit to erect these gas works on lots 16, 17 and 18 in block 2 of Pomeroy & Mills sub. of the Hollenbeck Tract, that the city parted with whatever authority or right it ever had to forbid the erection of gas works upon said premises.

The bill of appellant in the Circuit Court does not disclose what authority the Board of Fire Commissioners had to grant a permit to erect gas works in the City of Los Angeles, if indeed it had any; in fact, the said bill does not allege that a permit was granted, nor does it contain any copy of what it purports was a permit. It only alleges that a majority of the members of said Board of Fire Commissioners, upon a motion made by one of its members to grant Mrs. Dobbins a permit, voted in the affirmative, and that one of the members of said board voting in the affirmative immediately gave notice that at the next meeting of the board he would move to reconsider the question, and that at the next meeting of the board this member did move to reconsider the question and the motion was lost by a majority vote. As to whether or not the permit was granted, the bill does not otherwise disclose. Can this court determine, therefore, that the permit ever was issued, or that the board had authority to issue it? The court will take judicial cognizance that the council is the legislative body of the city. But, let us suppose both that the Board of Fire Commissioners had the authority to grant such a permit and that it did grant it to Mrs. Dobbins; we contend that it would not constitute a contract between the City

of Los Angeles and Mrs. Dobbins. We contend that at most it would only restore to Mrs. Dobbins that right which had previously been taken away from her. When, if ever, it did so is not disclosed by the bill; but if this right had not previously been taken from her there was no need of the permit. So that in granting her the permit, it would be only restoring to her that which had been taken away from her, or, in other words, restoring her to the *status quo* of a person from whom the right had never been taken, and she would be in no better position and have no superior rights to a person who owned property in the district prior to any legislation by the city upon the subject. And so we contend that her alleged vested rights and alleged contractual rights under this purported permit are in no way more sacred or superior to the rights of any person who owned property in this district prior to any legislation by the city on this subject. And we further contend that the enforcement of this ordinance against Mrs. Dobbins would deprive her of no rights, that a person who began the erection of a gas building in said district prior to any legislation by the city on this subject, would have been deprived of by this ordinance. Nor does it affect any right she has differently from what it would the rights of such a person.

But, assuming for the sake of this argument that the permit was in its nature a contract (which we claim it was not), and that by relying upon and spending money in beginning the erection of gas works under it, she secured vested rights, still we contend that these vested rights, like all vested rights, and the ob-

ligations of this assumed contract like the obligations of all contracts, must yield to the enactment and enforcement of laws and ordinances under the police powers of states and municipalities; that there are no private vested rights or contractual relations between individuals that are so sacred but that they must yield to the enactment and enforcement of laws made for the benefit of society under and by virtue of the police powers inherent in the state and delegated by it in this instance to the city. If this were not so, the rights of the individual would be superior to the rights of society, and the unit would be greater than the whole.

A MUNICIPALITY CANNOT GIVE, GRANT, BARTER AWAY OR PART WITH ITS RIGHT TO EXERCISE THE POLICE POWER DELEGATED TO IT BY THE STATE.

Mr. Cooley in his work on Constitutional Limitations, 6 Ed., at page 341, says:

"It would seem, therefore, to be the prevailing opin-
"ion, and one based upon sound reason, that *the state*
"cannot barter away, or in any manner abridge or
"weaken, any of those essential powers which are in-
"herent in all governments, and the existence of which
"in full vigor is important to the well-being of organ-
"ized society; and that any contracts to that end are
"void, upon general principles, and cannot be saved
"from invalidity by the provision of the national Con-
"stitution, now under consideration."

"The general principle is that it is not within the
"power of a common council to bind its legislative ca-

"pacities by any arrangement or stipulation so as to "disable itself from enacting any laws that *might be* "*deemed* essential for public good."

Russell on Police Powers, page 88.

In Davenport v. City of Richmond, 59 Am. Rep., 694, s. c. 81, Va. 636, was a case where a conviction of the violation of an ordinance forbidding the keeping of powder had been had. The city council had conveyed to defendant's grantors the premises in question, near the outskirts of the city, to be used by them as a powder magazine, subject to such regulations relative to the storage, receipt, delivery and transportation of powder as the council may prescribe. A subsequent ordinance declared the said magazines dangerous to life and property and directed them to be removed at the expense of the owners, to some more remote locality.

Davenport claimed that the ordinance was invalid and unconstitutional because it divested him of vested rights and impaired the obligation of the contract entered into between the city and himself and his grantors. The court, in rendering its decision, says:

"It is contended that the ordinance complained of "is unconstitutional and void; first, because it impairs "vested rights of the defendants under a previous valid "contract with the city council; and second, because "it takes the property of the defendant without com-"pensation.

"Upon the principles recognized by this court in R. "F. and R. R. Co. v. City of Richmond, 26 Gratt., 83, "*we are of opinion that this position is not well taken.* "In other words, that the withdrawal of the privilege "previously granted to the defendants—to erect and "maintain a powder magazine within the city limits— "was a valid exercise of the police power with which,

"to that extent, the city is invested by the legislature, "and with reference to which the privilege was granted "and accepted. And hence the inconvenience of which "the defendants complain is *damnum absque injuria.*

"However difficult it may be, if it is possible at all, "to exactly define the limits of that power, there is no "doubt that it extends to the protection of the lives, "health, morals and safety of all persons in the com- "munity, *and that it cannot, by contract or otherwise, "be parted with by a municipal corporation to which it "may be delegated.* * * * * * * * *

"It is sufficient to say that the storage of gun-pow- "der in a city or town, being attended with danger, "its regulation is a matter within the power of cor- "porate authorities, and consequently the judgment of "the city council as expressed in the ordinance requir- "ing the removal of the magazines in question, is con- "clusive upon the courts.

"The Haustings court, therefore, did not err in in- "structing the jury that 'the fact that the city of Rich- "mond in 1866 *sold to the defendants, or to those un- "der whom they claim title, the site of the powder "magazines now ordered by the council to be removed "for the purpose or with the knowledge that the same "was to be used for the erection of powder magazines, "does not prevent the city council from passing the "ordinance of August* 17, 1882, *if, in the judgment of "that body the safety or convenience of the people de- "mands the removal of said magazines.' "*

In the case of Newson v. City of Galveston, 13 S. W. Rep., 368, the facts were as follows: In October, 1884, the plaintiff Newson made application in writing to the city council for permission to establish under the ordinance of 1880, which was then in force, a private market, in the city of Galveston, for the sale of fresh meats. This application was granted by the council, and immediately thereafter the plaintiff established on Twenty-first street, in said city, a private market for

the sale of fresh meats, fitting up the same at an expense to himself of several thousand dollars, and continued unmolested to conduct such market at a profit from that time until January 1, 1889, paying to the proper officer quarterly in advance the tax imposed by that ordinance for the exercise of such privilege. In October, 1888, the City Council passed another ordinance amending the ordinance of 1880, and making it unlawful to conduct a private market in the district where plaintiff's market was situated, and where he had been granted a permit by the city five years before to erect it. In January, 1889, plaintiff was arrested for carrying on a private market on his aforesaid premises in violation of the ordinance passed five years after he had erected his market. The contention was that the ordinance impaired his vested rights and the obligation of his contract with the city, and was in conflict with the Constitution of the United States. The court says in its opinion with reference to this contention as follows:

"*Police powers possessed by such (municipal) cor-*
"*porations cannot be fettered by contracts, but must be*
"*left free to be exercised at all times whether in confer-*
"*ring or withdrawing privileges once conferred.* If li-
"cense tax had been paid for a year, this would not de-
"prive the city of the power to withdraw the privilege
"before its expiration if the public welfare demanded it.
"Much less would the fact that the city for a time had
"received the tax and granted the privilege make it in-
"cumbent on it to continue to do so. *If appellant ex-*
"*pended money in preparing his private market place*
"*for the conduct of his business, he did so with the full*
"*knowledge that the city might at any time forbid the*
"*business (market) to be there conducted.*"

The foregoing case we regard as being a parallel case with the one now under consideration, and the facts therein were even more favorable to the plaintiff Newson than they are to the appeliant herein. And we believe that the principles of the law declared in that case apply to the purported facts of this case.

"The legislature of a state *cannot by any contract* "limit the exercise of the police power of the state to "the prejudice of the general welfare in regard to pub- "lic health."

Butchers' Union, etc., v. Crescent City, etc., 111 U. S. 746.

We desire to call the court's attention to the case of Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659; s. c. 24 L. Ed. 1036, and commend it to careful reading, as we regard it as one of the most important cases in all the reports on the question involved here. It is too long to be quoted. *In that case it was held that a grant by the state of Illinois to a private corporation of a right or privilege to manufacture fertilizers in a certain territory could be abrogated and destroyed by an ordinance of the village of Hyde Park, to which general "Police Powers" had been subsequently delegated by the state,* and that the Fertilizing Company could be thus compelled to abandon its works, which it had erected and established at a cost of more than $200,000, although when the establishment was erected it was in swampy ground remote from buildings and the village of Hyde Park had grown up around it afterwards. The court held that the ordinance of the village was not such impairment of the obligation of the charter-contract between the company

and the state, or impairment of the vested rights of the company as is forbidden by the constitution of the United States. The facts in favor of the Fertilizer Company in that case were much stronger than those in favor of appellant herein and the loss sustained by said company much greater than that sustained by appellant or Mrs. Dobbins herein.

We submit that the foregoing authorities fully sustain our contention that the city of Los Angeles could not by the act of its Board of Fire Commissioners part with its right to regulate and prohibit the erection of gas works within its boundaries, or barter away its right (which is also its duty) to protect the health, safety and comfort of its citizens.

ALL INTERESTS IN PROPERTY AND RIGHTS IN CONTRACTS WHETHER *VESTED* OR NOT ARE ACQUIRED AND HELD BY INDIVIDUALS AND CORPORATIONS SUBJECT TO THE RIGHT OF THE STATE AND MUNICIPALITY TO EXCRCISE THEIR *"POLICE POWER"* FOR THE PROTECTION OF THE LIVES, HEALTH, SAFETY AND COMFORT OF THEIR CITIZENS.

Mr. Cooley, in his work on Constitutional Limitations, 6 Ed., at page 707, in discussing "the police power of the states," and especially with reference to the "impairment of the obligations of contracts" in the exercise of the said "police power," says:

"*Obligation of Contracts*—The occasion to consider "this subject in its bearing upon the clause of the Con- "stitution of the United States which forbids the states "passing any laws impairing the obligation of contracts "have been frequent and varied; and it has been held "without dissent that this clause does not so far remove "from state control the rights and properties which de- "pend for their existence or enforcement upon con- "tracts, as to relieve them from the operation of such "general regulations for the good government of the "state and the protection of the rights of individuals as "may be deemed important.

"*All contracts and all rights, it is declared, are sub- "ject to this power; and not only may regulations "which affect them be established by the state, but "all such regulations must be subject to change from "time to time, as the general well-being of the com- "munity may require, or as the circumstances may "change, or as experience may demonstrate the ne- "cessity.*

"Perhaps the most striking illustrations of the prin- "ciple here stated will be found among the judicial de- "cisions, which have held that the rights insured to "private corporations by their charters, and the manner "of their exercise, are subject to such new regulations "as from time to time may be made by the state with "a view to the public protection, health and safety, and "in order to guard properly the rights of other individ- "uals and corporations. Although these charters are to "be regarded as contracts, and the rights assured by "them are inviolable, it does not follow that these rights "are at once, by force of the charter contract, removed "from the sphere of state legislation, and that the char- "ter implies an undertaking, on the part of the state, "that in the same way in which their exercise is per- "missible at first, and under the regulations then exist- "ing and those only, may the corporators continue to "exercise their rights, while the artificial existence con- "tinues.

"The obligation of the contract by no means ex- "tends so far; but, on the contrary, the rights and priv- "ileges which come into existence under it are placed "upon the same footing with other legal rights and

"privileges of the citizen, and subject in like manner "to proper rules for their due regulation, protection "and enjoyment."

In the well considered case of Mugler v. Kansas, 123 U. S. 669; s. c. 31 L. Ed. 205, where it was contended that a law of Kansas enacted under and by virtue of the "police powers" inherent in the state, was invalid because it impaired vested rights and was therefore in conflict with the Fourteenth Amendment of the Constitution of the United States, Mr. Justice Harlan, who rendered the opinion, says:

"It cannot be supposed that the states intended "by adopting that amendment (the 14th), to impose "restraints upon the exercise of their powers for the "protection of the *safety, health* or morals of the com- "munity. * * * The principle that no person "shall be deprived of life, liberty or property without "due process of law, was embodied, in substance, in "the constitution of nearly all, if not all, of the states "at the time of the adoption of the Fourteenth Amend- "ment; *and it has never been regarded as incompatible "with the principle,*—equally vital because essential to "the peace and safety of society,—*that all property in "this country is held under the implied obligation that "the owner's use of it shall not be injurious to the com- "munity.* * * *

"A prohibition simply upon the use of property for "purposes that are declared by valid legislation to be "injurious to the health, morals and safety of the com- "munity, cannot in any just sense be deemed a taking "or an appropriation of property for the public benefit. "Such legislation does not disturb the owner in the con- "trol or use of his property for lawful purposes, nor "restrict his right to dispose of it, but is only a declara- "tion by the state that its use by any one for certain for- "bidden purposes is prejudicial to the public interests."

Mugler v. Kansas, 123 U. S. 669.

"It may be said in general terms independently of "any positive enactment that *it is the right of society "in the midst of a populous settlement to be exempt "from proximity of dangerous and noxious trades,* and "that it is the duty of owners of real estate in the "midst of many habitations *to abstain from erecting "buildings thereon,* or otherwise using it for carrying "on a *business dangerous to the lives, health or com-"fort* of the inhabitants of such dwellings, *although a "trade in itself useful or beneficial to the public.* But "such general duty and obligation not being fixed by "rule precise enough for judicial purposes, we think "it is competent for the legislature to interpose and by "a special enactment to declare what shall be deemed "a dangerous or noxious trade, under what circum-"stances and within what distances of habitations it "may or shall not be set up, how the use of it shall be "regulated, and to prohibit any other than such regu-"lated use by specific remedies."

Com. v. Alger, 7 Cush. 96.

The case of the Corporation of Knoxville v. Bird, 12 B. J., Lea, 121, we consider parallel with the present case and in point. The facts were as follows:

On the 11th day of February, 1882, the owner of a lot on Asylum street, in the city of Knoxville, leased to the defendant the lot in question for three years, with an agreement that a livery stable was to be erected thereon, the dimensions and character of which were stipulated for in the contract. The lessees, *in pursuance of this agreement,* had contracted for the building to be erected, had procured the lumber to be placed on the ground and begun to fashion it for the erection of the building—*having prepared the brick pillars on which it was to stand.* The building itself was to be of wood.

After the building had progressed thus far in its

course of erection, the city passed an ordinance making its erection in the district where it was situated unlawful.

Defendant was arrested and convicted for a violation of the ordinance. His contention was that the ordinance was unconstitutional because it impaired the obligation of his contracts with the builders and the lessor and had also impaired his vested right, etc., etc.

The court, in rendering its opinion, says:

"The argument is earnestly pressed upon us that "the ordinane is void as impairing the obligation of "the contract with the owner, to build, or with the "workmen who had contracted to erect the building.

"We take it there is nothing in this objection. The "principle applied to this aspect of the case is thus "stated by Mr. Parsons: 'If one agrees to do a thing "which is lawful for him to do, and it becomes unlaw-"ful by an act of the legislature, the act avoids the "promise, and so if one agrees not to do that which he "may lawfully abstain from doing, but a subsequent act "requires him to do it, this act also avoids the prom-"ise.' [*Parsons on Contracts, Vol. 2, page 674.*]

"As a matter of course, the power of the legisla-"ture must be exercised in subservance to the Consti-"tution, and in accordance with it. It is prohibited to "pass any law impairing the obligation or element of "legal compulsion in contracts, and this prohibition is "imperative in all the field of pure contract obligations, "which, when complete and lawful at the time, are be-"yond the reach of the legislative action.

"But the principle upon which the doctrine of non-"impairment of contracts stands is, that the law for its "enforcement and execution existing at the time makes "a part of the contract, so enters into it as to become "a part of it and therefore stands protected by the con-"stitutional inhibition.

"By this principle the contract in this case must be "held to have been entered into in view of the right on "the part of the city to exercise its police powers for

"the benefit of all its citizens, and so this legal and con-
"stitutional right in its proper exercise, entered into
"the contract of the parties, or rather, it was made in
"subservance to the exercise of the granted favor found
"in the charter, as the law of its creation. The prop-
"erty was in the city, the contract to be executed in
"the city, and as a matter of course subject to the exer-
"cise of all the rightful powers of the city govern-
"ment, charged with the protection and guardianship of
"the property of the people within its limits.

"This being so, the only question is, was the ordi-
"nance in question an exercise of the lawful powers of
"the mayor and aldermen, or was it for any cause
"void and inoperative. Its incidental effect in pre-
"venting the completion of the contract of building can-
"not be considered.

"It is true the exercise of this power by the city au-
"thorities tends in a considerable degree to impinge up-
"on and restrain the free use of the property of parties
"living within the prescribed limits, the highest idea
"of property being that over which man has complete
"dominion with which he may do as he pleases. But
"it is an essential element of every organized society
"that even this right is to be enjoyed in subordination
"to the general public interest of the whole body. For
"the benefits conferred by the protection given by law,
"and the general advantages received from organized
"society, this entire freedom is subject to be abridged
"and regulated within certain bounds, only limited by
"the requirements that private property shall not be
"taken or appropriated for public use without compen-
"sation being first made for the property thus used.
"The defendant in this case has only been required to
"submit his rights to the rule that a man must enjoy
"them subject to such regulation as to the interest of
"the society of which he is a member may demand."

"A city ordinance passed under the statutes of 1872,
"C. 243, and providing that a wooden building shall
"not be built within a certain distance of another
"wooden building, applies to such a building erected
"after the ordinance took effect, *although before the*
"passage work was begun upon the cellar upon the site
"of the proposed building, a contract was made for its

"erection, and lumber had been bought and prepared in "accordance with the contract."

(***Syllabus***) ***City of Salem v. Maynes, 123 Mass. 372.***

Three other well considered cases to like effect as the last case cited are the cases of People v. Hawley, 3 Mich., 330; Davenport v. City of Richmond, 81 Va. 636, hereinbefore cited, and Newson v. City of Galveston, 13 S. W. 368, hereinbefore cited.

"An act of the legislature provided there should not "be any private market kept within 12 squares of a pub- "lic market in the city of New Orleans.

"Held, not unconstitutional either as taking away "the property of those keeping private markets at the "time of the passage of the act within the prescribed "limits or as taking away the vested rights of those "holding licenses to keep such markets."

City of New Orleans v. Stafford, 21 Am. Rep. 563

"All property and vested rights of individuals are "subject to such regulations of police as the legislature "may establish with a view to protect the community "and its several members against such use or employ- "ment thereof as would be injurious to society or un- "just toward other individuals."

2 Story Constitution, Sec. 1954.

"The Fourteenth Amendment of the U. S. Consti- "tution is not designed to interfere with the power of "the state sometimes termed its 'police power,' to pre- "scribe regulations to promote the health, peace, morals, "education and good order of the people."

Barbier v. Connolly, 113 U. S. 27.

"It is usual and proper where a building or works "are being erected that can only be used for a purpose "that is unlawful *to restrain the erection.* The works, "if erected, might tempt the owner to use them, and "it seems like trifling to permit any one to go on with a "building which he can never be permitted to use."

Cleveland v. Citizens' Gas Light Co., 20 N. J. Equity Reports, 206.

So in this case at bar the gas works that are being erected without the limit prescribed by the ordinance of March 3rd, 1902, can only be used and maintained for a purpose which under the said ordinance is declared to be unlawful, and therefore if the erection of them could be restrained by injunction they certainly can be forbidden and prohibited by an ordinance of the municipal legislature. The reasoning that would apply in the case of the court restraining them would apply with even greater force in the case of a municipal ordinance legislating against the erection of such buildings.

The cases of Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659; Camfield v. U. S., 167 U. S. 518; Book 42, Law Ed. 261; Crowley v. Christensen, 137 U. S. 87, Law Ed., Book 34, page 620; Barbier v. Connolly, 113 U. S. 27 (all cited hereinbefore) fully sustain us in our contention that all interests in property and rights in contracts, whether *vested* or not, are acquired and held by individuals and corporations subject to the right of states and municipalities to exercise their police powers at all times.

We think that a consideration of the above authorities will make it plain to the court that ordinance No. 7029 is not such an impairment of the obligation of

any contract of appellant or any vested right of appellant or of Mrs. Dobbins as will render it invalid or unconstitutional.

THE ALLEGATIONS IN APPELLANTS' BILL, AS TO THE *UNREASONABLENESS* OF THIS ORDINANCE ARE NOT SUFFICIENT TO JUSTIFY THIS COURT IN DECLARING THE ORDINANCE VOID ON THE GROUND THAT IT IS UNREASONABLE.

With reference to the appellant's contention that the said ordinance is invalid because unreasonable, we say that there are no facts before the court to successfully support such a contention, and cite the court to the following authorities with reference to the right of a court to declare a law invalid because unreasonable:

"Under a general grant of power over nuisances, "town authorities have no power to adopt an ordi- "nance declaring a thing a nuisance which in fact is "clearly not one, *but in doubtful cases depending upon "a variety of circumstances requiring judgment and "discretion their action is conclusive.*"

Harmon v. City of Lewiston, 46 Am. St. Rep. 893.

Barbier v. Connolly, 113 U. S. 27.

"The expediency or inexpediency of an act is a ques- "tion for the legislature and not for the court. When- "ever an act of the legislature can be so construed and "applied as to avoid a conflict with the Constitution

"and give it the force of law, such construction will be "adopted by the courts."

Slack *et al.*, v. Jacob *et al.*, 8 W. Va., 612.

"Courts have no right to set aside, to arrest or nul- "lify a law passed in relation to a subject within the "scope of the legislative authority on the ground that "it conflicts with their notions of natural rights, abso- "lute justice or sound morality."

Id., 638.

"The actions of the council were within their juris- "diction, and from their decision upon it there is no ap- "peal except to the public opinion of the new city. To "that tribunal, therefore, we remit all parties."

Waltman v. Philadelphia, 33 Pa. St., 212.

"For our purposes we must assume that if a state "of facts could exist that would justify such legisla- "tion it actually did exist when the statute now under "consideration was passed. For us the question is one "of power, not of expediency. If no state of circum- "stances could exist to justify such a statute, then we "may declare this one void because in excess of the "legislative power of the state, but if it could, we must "presume it did.

"Of the propriety of legislative interference within "the scope of the legislative power, the legislature is the "exclusive judge."

Munn v. Illinois, 94 U. S., 113, Book 28, L. Co- op., 77.

Peel Split Coal Co. v. West Va., 17 L. R. A., 389.

"When a town council is authorized by law to do "a particular act at its discretion, the courts will not "control this discretion and inquire into the propriety, "economy and general wisdom of the undertaking, or "into the details of the manner adopted to carry the "project into execution."

Darnelly v. Cabanns, 52 Ga. 212.

Wells v. Mayor, 43 Ga. 67.

"The conclusions of the learned trial judge was "made to depend almost wholly on the facts developed "by the evidence. If the jury had found the milk as "adulterated unwholesome, we have no doubt that the "trial judge would have sustained the convictions. "That the constitutionality of a statute ought not to "be made to depend on the finding of a jury on the "facts of a case is manifest. If the plain provisions of "the Constitution have been violated, or if the act can- "not be said to be a proper exercise of the police power, "in view of the *facts of which judicial notice may be "taken*, then the duty of declaring the act invalid is "clear. But in the absence of such finding the act "stands."

State v. Schlenker (Io.) 51 L. R. A. 351.

"But the defendant takes the broader ground that "the legislature cannot, under the Constitution, pro- "hibit the sale of milk from healthy cows which in the "natural state falls below the standard fixed by the act "unless such milk or the articles made from it are in "fact unwholesome or dangerous to public health. How "is that question of fact to be determined? The court "cannot take judicial notice whether the milk below "the standard is or is not unwholesome or dangerous to "public health. Is that to be a question for the jury? "If so, a court must charge a jury in each case if they "find milk below the standard to be unwholesome, then "the statute is constitutional; if they find it wholesome, "then the statute is unconstitutional. Evidently a con- "stitutional question cannot be settled, or rather un- "settled, in that way. The constitutionality would vary "with the varying judgment of juries. Either then the "legislature can, under the Constitution, forbid the sale "of milk below a certain standard, whether such milk "be in fact wholesome or not, *or else they cannot do this* "whether that milk be in fact wholesome or not. If "they may fix a standard, they must judge whether or "not milk below that standard is wholesome. The "courts cannot review that judgment."

People v. Cipperly (N. Y.) 4 N. E. 108.

In this case, if they can fix limits to keep gas houses out of any part of the city, they can fix these limits, and their judgment cannot be reviewed.

In the case of *In re* Wilshire, 103 Fed. Rep. 620, where the petitioner had been arrested and convicted for violating an ordinance of the City of Los Angeles, providing "That it shall be unlawful for any person, "firm or corporation *to erect, build, construct* or main- "tain in the City of Los Angeles any fence, building or "other structure of or to a greater length *than six feet "from the surface of a sidewalk, street or ground,* where "the same is erected or maintained, for the purpose of "painting thereon any sign or advertisement for adver- "tising purposes, or printing thereon or affixing or at- "taching thereto or thereon any bills or signs, placards, "cards, posters or other advertising matter for adver- "tising purposes," the constitutionality of said ordinance was attacked on the ground that it was unreasonable.

The judge, in his opinion, says:

"I entertain a good deal of doubt in respect to the "reasonableness of the maximum limitation placed upon "the structures in question by the municipal authorities "of the City of Los Angeles, but the fact that this doubt "exists is sufficient reason for the court to decline to "adjudge the ordinance invalid. It is only in clear "cases that such a judgment should be given."

"Statutes of 1891, Ch. 220, Sec. 1, prohibiting any "person from maintaining a stable for more than four "horses without a license from the board of health, is "a valid exercise of police powers of the common- "wealth and not of the right of eminent domain, and "such an exercise of police power is constitutional al- "though no provision is made for compensation to the "owner. It was said by Chief Justice Field in Lang-

"maid v. Reed, 159 Mass. 409, 34 N. E. 593, speaking "of the authority granted this court to issue an injunc- "tion to prevent the erection, occupancy or use of a "building or a stable for more than four horses: 'This "authority is independent of its powers as a court of "equity to restrain actual nuisances. A stable used for "more than four horses may or may not be a nuisance, "but whether it is or not, it is competent for the legis- "lature to say that it shall not be kept except in such "places as the mayor and aldermen of the city, or the "selectmen of town, may permit—and to confer upon "the court authority to enforce this prohibition by in- "junction, because stables in their nature, are often of- "fensive to the community, and the use of them may "be regulated by the legislature.' "

City of Newton v. Joyce, 166 Mass. 83; 44 N. E. 116.

With reference to the allegations in appellant's bill to the effect that the council of Los Angeles city, in the passage of said ordinance were actuated by bad and improper motives, the following authorities, we think, dispose of that contention effectually by holding that such matters as the bill sets up with reference thereto cannot be considered by the court.

"The rule is general with reference to the enact- "ment of all legislative bodies that the court cannot "inquire into the motives of the legislators in passing "them except as they may be disclosed on the face of "the acts or inferable from their operation considered "with reference to the condition of the country and ex- "isting legislation."

Hing v. Crowley, 113 U. S. 703.

Cooley on Constitutional Limitations, 5 Ed. 222, lays down the law to the same effect.

With reference to the contention made by appellant's counsel in their brief on file herein, to the effect

that the ordinance is invalid because it conflicts with Section 19, Art. XI., of the Constitution of the State of California, we confess that it is beyond our power to perceive where the conflict exists.

The said Section 19, Art XI., of the Constitution reads as follows:

"In any city where there are no public works owned "and controlled by the municipality for supplying the "same with water or artificial light, any individual, or "any company duly incorporated, for such purpose, un- "der and by authority of the laws of this state, shall, "under the direction of the superintendent of streets, "or other officer in control thereof, and under such gen- "eral regulations as the municipality may prescribe, for "damages and indemnity for damages, have the privi- "lege of using the public streets and thoroughfares "thereof, and of laying down pipes and conduits therein, "and connections therewith, so far as may be necessary "for introducing into and supplying such city and its "inhabitants either with gaslight, or other illuminating "light, or with fresh water for domestic and all other "purposes, upon the condition that the municipal gov- "ernment shall have the right to regulate the charges "thereof."

To us it is plain from the face of this section that it grants to private individuals and corporations the privilege only of using the streets and public thoroughfares of the city *for laying down pipes and conduits therein and connecting therewith* for the purpose of supplying gas or water.

Even such use of the public streets and thoroughfares must be made subject to such general rules as the city might prescribe.

There is nothing in this section of the Constitution which purports to or does deprive the city of the right

under its "police powers" to regulate the manufacture and storage of gas, or the city's right to restrict and confine the erection of gas works to certain definite districts of the city. The sole purpose of this section of the Constitution, as we view it, was to enable any individual or corporation who desired to furnish the city gas or water, under proper regulations, to use the public streets and thoroughfares for laying down pipe and conduits and making connections, without being compelled to obtain a franchise from the city to do so.

Is it possible that appellant thinks this section can be stretched to cover any more territory than *the public streets and thoroughfares of the city*, and that only for the purpose of laying pipe and conduits?

Appellant appears to think that because it has been granted a privilege, it has been given the city. We wonder that it did not claim the right to use the intersection of two streets for the purpose of erecting thereon these gas works and gas holder; and if the city had not recently acquired its own water works, we dare say appellant would be claiming the right, by virtue of said section, to convert one of the city parks into a reservoir. Appellant's contention, followed out, can but lead to this conclusion. We have been unable to find any judicial interpretation of this section of the Constitution giving it any broader effect than appears upon the face of it. We can not believe that the people, when they granted this right to the use of their public streets and thoroughfares, intended to deprive them-

selves of all right and power to regulate the erection and maintenance of gas works, and to be compelled to endure an intolerable nuisance where ever a soulless corporation might choose to erect and maintain it.

Respectfully sumbitted,

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W. B. MATHEWS,

City Attorney of the City of Los Angeles.

LE COMPTE DAVIS,

J. R. RUSH,

Solicitors for Appellee.

Supreme Court of the United States.

No. 507.—October Term, 1902.

The Davis and Farnum Manufacturing Company, Appellant, vs. The City of Los Angeles.	On appeal from the Circuit Court of the United States for the Southern District of California.

[March 2, 1903.]

This was a bill in equity filed in the Circuit Court for the Southern District of California by appellant, a citizen of Massachusetts, to restrain the city of Los Angeles and its officers from enforcing certain municipal ordinances, prohibiting the erection or maintenance of gas tanks or reservoirs within certain portions of the city.

The gravamen of the bill was that on September 1, 1901, Caroline W. Dobbins made a contract with the Valley Gas and Fuel Company, a California corporation, to build certain gas works for her, including all things necessary for the manufacture, recovery and storage of gas, on lands thereafter to be designated; that on September 17 the appellant made a contract with the Gas and Fuel Company to erect upon Mrs. Dobbins' premises a water tank and gas holder, having a capacity of 100,000 cubic feet of gas, and that immediately thereafter it constructed and prepared the material and machinery necessary for the erection of the tank and gas holder, and shipped the same to Los Angeles; that on September 28, Mrs. Dobbins purchased certain lands in Los Angeles, which were within the limits wherein it was lawful to erect gas works as described in a municipal ordinance adopted August 26, 1901, and on November 1 applied to the board of fire commissioners for a permit to erect such gas works; that on November 22, her petition came on for hearing before the fire commissioners, and after proof had been made that all provisions of prior ordinances had been complied with, the matter was duly considered, and finally resulted, November 29, in a vote to grant a permit to erect and maintain the gas works.

That upon the 22d day of November, Mrs. Dobbins' contractors began at once to lay the foundation for said works at a cost of upwards of $2,500, when on November 25, the city adopted an ordinance, amending that of August 26, 1901, including her property in the prohibited territory for the erection or maintenance of gas works, which ordinance, however, seems to have proved defective, and subsequently in February, 1902, caused certain of the employés of the Gas and Fuel Company to be arrested, charging them

with a violation of this ordinance. Subsequently under new proceedings certain employés of the plaintiff were arrested and the work stopped.

Another ordinance was passed on March 3, 1902, also amending that of August 26, 1901, and other arrests were made of the employés for a violation of this ordinance. It was averred that the gas works are in an uncompleted condition, exposed to the elements and in danger of being destroyed, and that all of the aforesaid ordinances were adopted by the common council at the instigation of the Los Angeles Light Company, which has enjoyed a monopoly of the gas business for the last ten years.

A demurrer was filed to this bill by the city for want of equity and of jurisdiction, which was sustained by the court, and the bill dismissed. (115 Fed Rep. 537,) apparently upon the ground that a court of chancery has no power to restrain criminal proceedings, unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there. Whereupon an appeal was taken to this court.

Mr. Justice BROWN delivered the opinion of the Court.

As the bill in this case is based not only upon diversity of citizenship, but upon the alleged unconstitutionality of the municipal ordinances of November 25, 1901, and March 3, 1902, as impairing the obligation of Mrs. Dobbins' contract with the city under prior ordinances, an appeal lies directly to this court, and upon such appeal the whole case is opened for consideration. (*Horner* v. *United States*, 143 U. S. 570; *Chappell* v. *United States*, 160 U. S. 499.) The State having delegated certain powers to the city, the ordinances of the municipal authorities in this particular are the acts of the State through one of its properly constituted instrumentalities, and their unconstitutionality is the unconstitutionality of a State law within the meaning of section 5 of the Circuit Court of Appeals act. (*City Railway Co.* v. *Citizens' R. R. Co.*, 166 U. S. 557; *Penn Mutual Life Insurance Co.* v. *Austin*, 168 U. S. 685, 694; *St. Paul Gas Light Co.* v. *St. Paul*, 181 U. S. 142, 148.)

2. The court below did not pass upon the validity of these ordinances, but came to the conclusion that a bill in equity would not lie to restrain their enforcement, and in this aspect we shall discuss the case. As the only method employed for the enforcement of these ordinances was by criminal proceedings, it follows that the prayer of the bill to enjoin the city from enforcing these ordinances, or prevent plaintiff from carrying out its work, must be construed as demanding the discontinuance of such criminal proceedings as were already pending, and inhibiting the institution of others of a similar character.

That a court of equity has no general power to enjoin or stay criminal proceedings unless they are instituted by a party to a suit already pending

before it, and to try the same right that is in issue there, or to prohibit the invasion of the rights of property by the enforcement of an unconstitutional law, was so fully considered and settled in an elaborate opinion by Mr. Justice Gray, (*In re Sawyer*, 124 U. S. 200,) that no further reference to prior authorities is deemed necessary, and we have little more to do than to consider whether there is anything exceptional in the case under consideration to take it out of the general rule. The plaintiff in the case of Sawyer sought to restrain the mayor and committee of a city in Nebraska from removing a city officer under charges filed against him for malfeasance in office. This was held to fall within the general rule and not within the exception.

The general rule that a Circuit Court of the United States, sitting as a court of equity, cannot stay by injunction proceedings pending in a State court to enforce the criminal laws of such State, was applied in *Harkrader* v *Wadley*, (172 U. S. 148,) to a case where the plaintiff sought to enjoin proceedings against him for the embezzlement of the assets of a bank; and in *Fitts* v. *McGee*, (172 U. S. 516,) to a suit brought by the receiver of a railroad against the attorney general of the State to restrain him from instituting or prosecuting criminal proceedings to enforce against the plaintiff the provisions of a State law reducing the tolls, which had been exacted of the public by the railroad, of which the plaintiff was receiver. This was held to be in reality a suit against the State to enjoin the institution of criminal proceedings, and hence within the general rule. See also *Prout* v. *Starr*, *ante*, p.

Plaintiff seeks to maintain its bill under the exception above noted, wherein, in a few cases, an injunction has been allowed to issue to restrain an invasion of rights of property by the enforcement of an unconstitutional law, where such enforcement would result in irreparable damages to the plaintiff. It cites in that regard the case of *Reagan* v. *Farmers' Loan & Trust Co.*, (154 U. S. 362,) in which, under a law of Texas giving express authority to a railroad company or other party in interest to bring suit against the railroad commissioners of that State, a bill was sustained against such commission to restrain the enforcement of unreasonable and unjust rates, and in the opinion a few instances were cited where bills were sustained against officers of the State, who, under color of an unconstitutional statute, were committing acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the State. It would seem that, if there were jurisdiction in a court of equity to enjoin the invasion of property rights through the instrumentality of an unconstitutional law, that jurisdiction would not be ousted by the fact that the State had chosen to assert its power to enforce such law by indictment or other criminal proceeding. (*Springhead Spinning Co.* v. *Riley*, L. R. 6 Eq. 558.)

In order to determine the exact property rights at stake in the case under consideration it should be borne in mind that this is not a bill by Mrs. Dobbins, the owner of the land and of the proposed gas works, to enjoin the city from interfering with carrying out the permit she had obtained to erect these gas works, nor by the Valley Gas and Fuel Company, with which she had made a contract to erect these works; but by a sub-contractor, which had made a contract with the Gas and Fuel Company to erect for *it*, and upon premises to be designated by Mrs. Dobbins, a water tank and gas holder; and, without even alleging that the Gas and Fuel Company had refused to carry out its contract, or pay to plaintiff damages, or that Mrs. Dobbins had refused to settle any claim the Gas and Fuel Company might have against her, seeks to enjoin the city of Los Angeles in the assumed right of Mrs. Dobbins from interfering with its servants and employés, and from preventing plaintiff from carrying out the work of erecting the water tank and gas holder, and also to desist and refrain from enforcing its ordinances. It sets up no contract of its own with the city which the municipal ordinances have impaired, but a contract of the city with Mrs. Dobbins, to which it was no party, in which it had no direct interest, and that, too, without averring that the Gas and Fuel Company was insolvent, or unable to respond to its claim for damages. It proceeds wholly upon the assumption that the revocation of Mrs. Dobbins' license will operate injuriously to it, and that it cannot obtain a full and adequate remedy at law by an action against the Gas and Fuel Company upon its contract to pay the price agreed upon between them.

It is true the bill is based upon the theory that plaintiff would suffer great and irreparable loss by the interference of the city and by the exposed condition of the works, and that the refusal of an injunction would result in innumerable actions at law and a multiplicity of suits, which would have to be instituted at great expense and without the possibility of recovering indemnity. We are not, however, bound by this allegation, when the facts set forth in the bill show that, if the plaintiff be entitled to a remedy at all, it has an action against the Gas and Fuel Company, which is presumed at least to be able to respond in damages for all such as plaintiff may have suffered by the interruption of the contract. Whether the Gas and Fuel Company in such action could defend upon the ground that the municipality had forbidden the prosecution of the work, might depend somewhat upon the terms of the contract, and upon the right of the Gas and Fuel Company to take advantage of the interference of the city. As to this we express no opinion. It is true the employés of the plaintiff were arrested, but that fact alone wrought no legal injury to the plaintiff, since if it were prevented from any cause for which the Gas and Fuel Company were chargeable, it might bring an action for damages against that company, with which alone its contract was made, and recover such damages as it could prove to have sustained.

It is true that in a number of cases bills have been sustained by one or more stockholders in a corporation against the corporation and other parties, to restrain the enforcement of an unconstitutional law against the corporation itself, but it has always been held, and general equity rule 94 requires, that such bill must contain an allegation under oath that the suit is not a collusive one to confer on a court of the United States jurisdiction, and must also contain an allegation that the directors of a corporation have refused to institute the proceedings themselves in the name of such corporation, and the efforts of the plaintiff to secure such action on the part of the directors, and the cause of his failure to obtain it. (*Dodge* v. *Woolsey*, 18 How. 331; *Hawes* v. *Oakland*, 104 U. S. 450; *Corbus* v. *Alaska Co.*, 187 U. S.) This rule, however, has no application to subcontractors who stand in no position to enforce the right of their immediate contractors, such as was the Gas and Fuel Company, or of the owner of the property who had agreed with such immediate contractors to do the work. The plaintiff in this case stands practically in the position of one who seeks to take advantage of the unconstitutionality of a law in which it has only an indirect interest, and by the enforcement of which it has suffered no legal injury. In this it stands much in the position of the plaintiff in *Tyler* v. *Court of Registration*, (179 U. S. 405,) and in *Turpin* v. *Lemon*, (*ante*, p. ;) *In re Wellington*, (16 Pick. 87, 96;) *Sinclair* v. *Jackson*, (8 Cow. 543;) *Jones* v. *Black*, (48 Ala. 540;) *Shehane* v. *Bailey*, (110 Ala. 308;) *Dejarnett* v. *Haynes*, (23 Miss. 600.)

In this connection, also, the appellant cites the case of *Reagan* v. *Farmers' Loan & Trust Co.*, (154 U. S. 362, 393,) in which we held that the trustee of the bondholders of a railway corporation could maintain a suit against the State railway commission to restrain the enforcement of unreasonable and unjust rates. The case, however, was put upon the express ground that the bondholders were the equitable and the beneficial owners of the property of the corporation, and in that capacity might "invoke the judgment of the Federal courts as to whether the contract rights created by the charter, and of which it is the beneficial owners, are violated by subsequent acts of the State in limitation of the right to collect tolls." In that case the bondholders were not only the beneficial owners of the property, but a reduction of the tolls might have resulted in the practical destruction of their securities, and unless the bill were maintained they were practically remediless. The case has but a remote analogy to the one under consideration.

As the appellant has shown no legal interest in this litigation, and no lack of a complete and adequate remedy at law, it results that the bill was properly dismissed, and the decree of the court below is therefore

Affirmed.